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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 848

SWIFT & COMPANY, INC. and ARMOUR AND COMPANY,
Petitioners,

—v.—

DON J. WICKHAM, Commissioner of Agriculture & Markets of the State of New York,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	PAGE
Citations to Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	3
Reasons for Granting the Writ	6
Conclusion	10
Appendix A—	
Opinion of the United States Court of Appeals for the Second Circuit	11
Appendix B—	
Opinion of the District Court	21
Appendix C—	
Statutes	43

Table of Authorities

Cases:

McDermott v. Wisconsin, 228 U. S. 115	7
Pacific Meat Co. v. Otagaski, 394 P. 2d 918 (Hawaii, 1964)	9

PAGE

Swift & Company v. Wickham, 382 U. S. 111, 15 L. Ed. 194 5

United States Constitution:

Article I, Section 8 ..... 4, 5

Article VI, Section 2 2

Fourteenth Amendment 4, 5

Statutes and Regulations:

Meat Inspection Act, 21 U. S. C. 71, 34 Stat. 1206 .. 7, 8

Food, Drug and Cosmetic Act, 21 U. S. C. 301, 52 Stat. 1049 6

Poultry Products Inspection Act, 21 U. S. C. 451, 71 Stat. 441 ..... 2, 3, 5, 6, 7, 8

28 U. S. C. Section 1254(1) 2

28 U. S. C. Section 2281 4

7 C. F. R. Sections 81.1, 81.3, 81.7, 81.125, 81.127, 81.130 3

Agriculture and Markets Law of the State of New York, Section 193 ..... 3, 4

State of New York Regulations 221.40 and 221.9C 3

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SWIFT & COMPANY, INC. and ARMOUR AND COMPANY,

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—v.—

DON J. WICKHAM, Commissioner of Agriculture & Markets of the State of New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on July 12, 1966.

Citations to Opinions Below

The opinion of the District Court (R. 8A-31A), printed in Appendix "B" hereto, *infra*, p. 21, is reported in 230 F. Supp. 398. The opinion of the Circuit Court of Appeals (R. 157A-166A), printed in Appendix "A" hereto, *infra*, p. 11, is reported in 364 F. 2d 241.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on July 12, 1966 (R. 167A). An order extending the time within which to file a petition for certiorari to December 9, 1966 was signed by Mr. Justice Harlan on September 28, 1966. The jurisdiction of this court is invoked under 28 U. S. C. Section 1254(1).

Questions Presented

1. Whether the Poultry Products Inspection Act and the regulations promulgated thereunder which require the advance approval of labels of poultry and poultry products by the Secretary of Agriculture have preempted the field of labeling of those products so as to render unlawful the New York statute and regulation requiring additional labeling material on the label of stuffed turkey.

2. Whether the New York statute and regulation requiring the weight of the turkey in addition to the weight of the stuffed turkey on the label of the latter product are in such direct conflict with the Poultry Products Inspection Act as to render them unlawful under Article VI, Section 2 of the United States Constitution, where the Secretary of Agriculture has rejected a label showing any other weight statement except the weight of the stuffed turkey.

Statutes Involved

The Poultry Products Inspection Act; Sections 81.1, 81.3, 81.7, 81.125, 81.127, 81.130 of 7 C. F. R.; Section 193 of the Agriculture and Markets Law of the State of New York; and Regulations 221.40 and 221.9C of the State of New York. They are set forth in Appendix "C" hereto, *infra*, pp. 43-74.

Statement of the Case

Petitioners pack frozen stuffed turkeys in Minnesota and Wisconsin. They ship the turkeys into other states for sale to retailers who resell them to consumers. These turkeys are labeled so as to show the total net weight of the poultry product, viz., stuffed turkeys, as required by the United States Department of Agriculture. Section 193 of the Agriculture and Markets Law of the State of New York and regulations issued thereunder require a separate statement of the net weight of the turkey in addition to the net weight of the whole product. Pursuant thereto, respondent, Commissioner of Agriculture & Markets of the State of New York, has taken and threatened to take action that has prevented and will continue to prevent the sale of petitioners' stuffed turkeys, unless they are labeled in compliance with New York Law.

In mid-1963 both petitioners applied to the United States Department of Agriculture for approval of a label which would satisfy the New York requirement. In accordance with its long-standing policy against multiple-weight statements on combination products, the Department of Agriculture denied these applications. Petitioners did not seek administrative or judicial review of these denials.

Petitioners brought this action in the United States District Court for the Southern District of New York seeking a declaration of their right to sell stuffed turkeys in New York under the federally approved label and an injunction against respondent's enforcing the New York labeling law. The complaint alleges that Section 193 of the New York Agriculture and Markets Law and the action taken and threatened by respondent under it violate petitioners' rights under the commerce and supremacy clauses of the United States Constitution and the due process and equal protection clauses of the 14th Amendment. At petitioners' request, the action was heard by a three-judge court pursuant to 28 U. S. C. Section 2281.

The District Court dismissed the complaint and entered judgment for respondent. The Court found no merit in petitioners' contention with respect to the commerce clause or the claims under the 14th Amendment. With respect to the supremacy clause, the Court found no congressional purpose to preempt the field so as to preclude state action with respect to the labeling of poultry products. The Court further found that there was no irreconcilable conflict between the federal act and the New York statute so as to render the latter invalid. In this connection, the Court held that petitioners could, consistent with the federal law, add a supplementary label to their products which label would not bear any indicia of federal approval. Finally, the District Court questioned whether this was properly a case for a three-judge court, but left the issue open suggesting that petitioners prosecute simultaneous appeals to the Supreme Court and to the Court of Appeals for the Second Circuit. Both appeals were filed and the matter was held in abeyance in the Court of Appeals pending deter-

mination of this issue in this Court. On November 22, 1965 the Supreme Court handed down its decision in which it held that this matter was not properly a three-judge court case and, accordingly, the Supreme Court had no jurisdiction to hear the appeal. In reaching this conclusion, the Supreme Court held further that petitioners' claims with respect to the commerce clause, Article I, Section 8, Clause 3, and the 14th Amendment of the United States Constitution were insubstantial. *Swift & Company v. Wickham*, 382 U. S. 111, 15 L. Ed. 194.

Thereafter, petitioners pursued their appeal which had been held in abeyance in the Court of Appeals for the Second Circuit. That Court rendered its decision on July 12, 1966, affirming the judgment of the District Court. The only two issues remaining before the Court of Appeals were those pertaining to preemption and conflict with the Poultry Products Inspection Act, 21 U. S. C. 451, 71 Stat. 441. The Court of Appeals found no basis for the claim that Congress had preempted the field of labeling of poultry products, although it expressly refused to rule that no preemption was intended in any part of the Poultry Products Inspection Act. The Court also found, with somewhat more difficulty, that there was not presented by the record in this case an irreconcilable conflict between New York and federal law.

Reasons for Granting the Writ

1. This case presents an issue which has never been determined in this court: viz., whether Congress, by providing for advance approval by the Secretary of Agriculture of labels on poultry products before they may be printed for use on such products, has precluded the states from regulating those selfsame labels. The Poultry Products Inspection Act prescribes a system of regulation of labeling different in nature than that incorporated in the Food, Drug and Cosmetic Act, 21 U. S. C. 301, 52 Stat. 1049. Under the latter statute, the text of labels of food products are subject to judicial review and that only after introduction of the food into interstate commerce and a challenge of the legality of its label by the Food and Drug Administration. Indeed, poultry products were subject to the Food, Drug and Cosmetic Act prior to the passage of the Poultry Products Inspection Act in 1958. It is of no little significance that Congress, in placing these products under the supervision of the Department of Agriculture, found it necessary and expedient to provide for advance approval by the Secretary of Agriculture before a label could be affixed to a poultry product processed under his supervision. It is reasonable to conclude from this change that Congress sought to invest the Secretary of Agriculture with complete control over the labeling of poultry products as distinguished from the more limited supervisory powers possessed by the Secretary of Health, Education & Welfare under the Food, Drug and Cosmetic Act. Here we have a product moving in interstate commerce bearing a label whose text had been approved by the Secretary of Agriculture before it was printed for use on

the poultry product and the action of the State of New York preventing the free movement of this product into that state. Furthermore, the Secretary of Agriculture has rejected for use on this same poultry product a label which would have satisfied the requirements of the State of New York. It follows, then, that the federal superintendence of the field which obviously was intended by Congress in passing this statute has been seriously impaired by the action of the State of New York, *McDermott* v. *Wisconsin*, 228 U. S. 115. In fact, the decisions below require the Secretary of Agriculture, in exercising his statutory authority to prescribe labeling on poultry products, to defer to the demands of the individual states, thereby effectively thwarting the manifest intention of Congress that the Secretary, in the field of labeling, be his own master.

2. The decision of the court below is of paramount importance in the administration of the Poultry Products Inspection Act. Since the Act was passed and put into operation, the Secretary of Agriculture has exercised his authority to grant prior approval of labels without concern for the possibility of contrary state labeling requirements. Moreover, the decision of the Court of Appeals vitally affects the enforcement of the Meat Inspection Act, 21 U. S. C. 71, 34 Stat. 1206, which is also administered by the Department of Agriculture. Under this latter statute, the Secretary has applied the procedures of prior approval, without challenge, since the Act first went into operation in 1907. The decision of the Court of Appeals requires the Secretary to alter his practices of long standing with respect to approvals of labels for poultry and meat products: wherever individual states have different or additional material which they wish to have appear on

a label, the Secretary must either defer to the states or, in the alternative, he must be prepared to conduct hearings on any label which his Administrator chooses to reject for reasons consistent with the administration of the statute but which, nevertheless, is required to satisfy the demands of one of the fifty states or political subdivisions thereof. Obviously, administrative chaos will result from such a situation. It is significant that no such hearings have been conducted in the nearly sixty-year history of the Meat Inspection Act or in the eight-year history of the Poultry Products Inspection Act. If the courts below were of the belief that such administrative difficulties would be avoided by cooperation between the federal and state agencies, the vanity of that belief is demonstrated by the fact that, despite the express urging of the Court of Appeals that "the administrative agencies involved in this controversy should seek to resolve this unsettled situation without delay" (R. 166a), absolutely no progress has been made in that direction since the opinion of the Court of Appeals was handed down on July 12, 1966. In Petitioners' application for an extension of time within which to file a petition for a writ of certiorari, counsel for Petitioners stated the following:

> "A series of meetings between representatives of the petitioners and officials of the United States Department of Agriculture have been conducted during this summer in an effort to resolve the problem which gave rise to this litigation in accordance with the suggestion contained in the last sentence of the Court of Appeals' opinion. We are advised that the Department of Agriculture expects to have formulated a proposal of discussion with the authorities of the State of New York within the next several weeks."

Counsel is presently advised that no meetings between the federal and state agencies are planned in the foreseeable future, no proposal of discussion has been formulated by the Department of Agriculture and no activity of any kind has been initiated by the State of New York.

The era of convenience foods is only in its infancy and combination food products containing meat or poultry as a principal ingredient, already numbered in the hundreds, are certain to proliferate even more as time goes on. The labeling of these products will become increasingly complicated. The scope of labeling problems in a system involving concomitant state and federal regulation would not be limited to weight statements but would cover the whole spectrum of possible label representations. E.g., see *Pacific Meat Co.* v. *Otagaski,* 394 P. 2d 918 (Hawaii, 1964). The ultimate disposition of this case will apply not only to stuffed turkeys but to hundreds, perhaps thousands, of other poultry products and meat products. Obviously the outcome of this litigation is of transcendent importance in the administration of both of these major federal programs.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 348—September Term, 1965.

(Argued May 2, 1966 Decided July 12, 1966.)

Docket No. 30281

SWIFT & COMPANY, INC., and ARMOUR AND COMPANY,

Appellants,

—v.—

DON J. WICKHAM, Commissioner of Agriculture and Markets of the State of New York,

Appellee.

Before:

LUMBARD, *Chief Judge,*
MOORE and FEINBERG, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the Southern District of New York which dismissed a suit to enjoin enforcement of the New York Agriculture and Markets Act insofar as it regulates the labeling of turkeys shipped in interstate commerce.

Affirmed.

WILLIAM J. CONDON, New York, N. Y. (William J. Colavito and William P. Woods, New York, N. Y., and Arthur C. O'Meara, Chicago, Illinois, on the brief), *for appellant Swift & Company, Inc.*

GEORGE E. LEONARD, JR. and E. GORDON ROBBINS, Chicago, Illinois, *for appellant Armour and Company.*

PHILIP KAHANER, Assistant Attorney General, New York, N. Y. (Louis J. Lefkowitz, Attorney General of the State of New York, Samuel A. Hirshowitz, First Assistant Attorney General, and Joel Lewittes, Assistant Attorney General, New York, N. Y., on the brief), *for appellee.*

LUMBARD, *Chief Judge*:

Following a decision by the United States Supreme Court that it lacked jurisdiction on a direct appeal because the case was not properly one for a three-judge district court, 382 U. S. 111 (1965), appellants Swift & Company, Inc. (Swift) and Armour and Company (Armour) urge this court to reverse the decision of the district court for the Southern District of New York which dismissed appellants' suit for a declaratory judgment to enjoin New York's Commissioner of Agriculture and Markets from interfering with appellants' sales of stuffed turkeys in interstate commerce. Appellants contend that enforcement of New York's labeling requirements against their shipments of turkeys would violate the Supremacy Clause of the United States Constitution in light of federal regulation under the Poultry Products Inspection Act of 1957, 21 U. S. C. §§451-469. The opinion below was written by Circuit Judge Friendly for the three-judge panel, and District Judge Croake individually arrived at the same conclusion. 260 F. Supp. 398, 410. As a timely appeal to this court was held in abeyance, pending possible review by the Supreme Court, the appeal is properly before us. 28 U. S. C. §1291.

See *Turner* v. *City of Memphis*, 369 U. S. 350 (1962). We affirm.

Swift and Armour pack frozen stuffed turkeys in Minnesota and Wisconsin and ship them into New York for sale to retailers who resell them to consumers. The turkeys are labeled at appellants' processing plants outside New York State to show the total weight of the stuffed bird. The labels were approved (in advance) by the Administrator of the Consumer and Marketing Service of the United States Department of Agriculture (Administrator) as satisfying the requirements of Section 8 of the Poultry Products Inspection Act:

> (a) . . . Each immediate container of any poultry product inspected under the authority of this chapter and found to be wholesome and not adulterated shall at the time such product leaves the official establishment bear, in addition to the official inspection mark, . . . the net weight or other appropriate measure of the contents, [etc]. 21 U. S. C. §457.

The labels do not show the net weight of the unstuffed turkey.

Section 193(3) of New York's comprehensive Agriculture and Markets Law, 2B McKinney's Consol. Laws (1965 Supp.), provides:

> All food and food products offered for sale at retail and not in containers shall be sold or offered for sale by net weight, standard measure or numerical count under such regulations as may be prescribed by the commissioner [of Agriculture and Markets].

Though the phrase "net weight" appears in both statutes, the Director of the Bureau of Weights and Measures of the New York Department requires a label on stuffed tur-

keys to show the net weight both of the unstuffed and of the stuffed bird. This administrative interpretation is within the Commissioner's authority under the New York Act. See generally *Mounting & Finishing Co.* v. *McGoldrick*, 294 N. Y. 104, 60 N. E. 2d 825 (1945).

As the state had threatened to prevent sale of their turkeys in New York unless labels showing the net weight of the stuffed and unstuffed birds were affixed, appellants applied in mid-1963 to the United States Department of Agriculture for federal approval of labels which would satisfy the New York requirement: The submitted labels were rejected by the head of the Poultry Products Section of the Inspection Branch of the Poultry Division of the Department's Consumer and Marketing Service.

The federal statute, 21 U. S. C. §457(b), and the regulations, 7 C. F. R. §81.130(c) (1966), permitted an appeal to the Administrator from the Poultry Division's rejection of appellants' proposed labels. Under these provisions, appellants could have requested a hearing, and could have appealed an adverse decision by the Administrator to a United States Court of Appeals. Rather than seek such administrative relief, appellants brought this action to have the New York statute and regulations declared unlawful and to enjoin their enforcement.

The complaint alleged that the New York law violated the Supremacy Clause because Congress in the Poultry Products Inspection Act "exercised its power to the fullest with regard to poultry and poultry products," and, in the alternative, because the New York provisions were in direct conflict with the federal statute and regulations as interpreted.[1] After a three-day trial and the submission of briefs,

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1 The complaint also alleged violations of the Commerce Clause and the Fourteenth Amendment. In ruling that the case was not properly one for a three-judge court, the Supreme Court held that these claims

the district court dismissed the complaint. It held that Congress through the Poultry Products Inspection Act did not "oust all weight regulation by states into which federally inspected poultry or poultry products are shipped," and that plaintiffs had failed to establish an irreconcilable conflict between the New York and federal statutes and regulations.

Federal Preemption

Appellants contend that the Poultry Products Inspection Act is a "broad comprehensive system of inspection and regulation of poultry and poultry products moving in interstate commerce," that the labeling portions of this legislation are an essential and integral part of the system, and that state laws additionally regulating the labeling of poultry products are therefore preempted. In treating this question, we begin with the Supreme Court's caution that, "[F]ederal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion or that Congress has unmistakably so ordained." *Florida Avocado Growers* v. *Paul*, 373 U. S. 132, 142 (1963).

The lower court dealt exhaustively with the history and content of the federal Act and concluded that Congress had not preempted more detailed state regulation of the manner in which poultry products are weighed, measured and labeled. We find several reasons for agreeing with this conclusion. First, the principal focus of the federal law was to combat the distribution of adulterated poultry

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were "too insubstantial to support the jurisdiction of a three-judge court." 382 U. S. at 115. We think the district court was clearly correct in dismissing these counts.

through a uniform scheme of federal inspection. We find no basis for concluding that Congress intended the incidental and less exhaustive labeling provisions to preempt this particular area of state regulation. Second, the Poultry Products Inspection Act's labeling provisions are similar to those in the federal Pure Food, Drug, and Cosmetic Act, 21 U. S. C. §§321(k), (l) and (m), 331(a), (b), (i) and (k), which are not preemptive of state regulation. See *Corn Prods. Ref. Co.* v. *Eddy*, 249 U. S. 427 (1919). Finally, we find nothing in the nature of the subject matter being regulated—the disclosure of the net weight of poultry products—that requires a uniform national standard.[2] See *Florida Avocado Growers* v. *Paul*, 373 U. S. at 144. We agree with the district court and with the *amicus* brief of the Department of Justice that the Poultry Products Inspection Act does not preempt state regulation of the area in question.[3]

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2 The Department of Agriculture itself recognizes this principle as the Application for Label Approval includes the notice:

> Any approval of or comment concerning this labeling material or the working thereon as contained in this Notice must be understood to represent the attitude of this Service only, and does not exclude failure to comply with other applicable Federal or State law, or city or municipal regulations.

3 Of course we do not pass upon whether other portions of the Poultry Products Inspection Act, such as the Act's scheme for on-site inspection, preempt similar state regulation. Section 18(a) of the Act, 21 U. S. C. §467(a), provides that:

> For the purpose of preventing and eliminating burdens on interstate commerce in poultry and poultry products, the jurisdiction of the Secretary within the scope of this Act shall be exclusive and poultry and poultry products shall be exempt from the provisions of the Federal Food, Drug, and Cosmetic Act, as amended, to the extent of the application or the extension thereto of the provisions of this chapter.

We are satisfied from an examination of the legislative history, see H. R. Rep. No. 465, 85th Cong., 1st Sess., 1957-2 U. S. Code, Cong. & Admin. News 1630, 1635, and of the comparable scheme under the Meat

Direct Conflict with Federal Law

A more difficult question is whether an irreconcilable conflict has arisen between the Poultry Products Inspection Act and the New York Agriculture and Markets Act, as interpreted. Federal law prohibits the shipment of appellants' turkeys in interstate commerce without an approved label. 21 U. S. C. §458(a). It is not practicable to thaw the birds after shipment to New York and make a supplemental weighing and labeling in conformance with state law at that time. Since the federal authorities have rejected a label showing the multiple weights required by New York law, and since the state will not permit the sale of stuffed turkeys absent such a label, at least the seeds of conflict are present.

The district court nonetheless held that an irreconcilable conflict had not been established. Starting with the premise that New York would accept a supplemental label showing the multiple weights required, Judge Friendly then noted that nothing in the federal Act indicated that such an additional label was necessarily unlawful.[4] Conceding that construction of the statutory phrase "net weight" was primarily a task for the Administrator, Judge Friendly nevertheless held that the Poultry Division's rejection of

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Inspection Act, 21 U. S. C. §§71-79, that this section does not indicate a congressional intent to preempt the field of poultry labeling. However, the same would not necessarily be true with respect to the more essential inspection provisions of the Act. Compare *Florida Avocado Growers, Inc.* v. *Paul, supra.*

4 There is ample evidence in the record from which to conclude that attachment of a supplemental label would not be costly, and that the extra procedure involved would not create a danger of spoilage. There may be some likelihood that such a label would confuse the consumer. On the other hand, the fact that the weight of a turkey's stuffing may constitute anywhere from 16% to 35% of its total weight is a valid reason for the state's concern in having multiple weights shown.

the particular labels submitted by Swift and Armour for approval in 1963 did not constitute a broad ruling "that any supplementary labeling of weight in addition to that satisfying the Department would be unlawful." Given this path to reconciliation of the statutory schemes, Judge Friendly concluded that appellants had not discharged their burden of establishing conflict because they had not sought a full-fledged hearing before the Administrator at which the State of New York's interests could be presented and perhaps satisfied.

Appellants' first argument is that, contrary to the assumption of the district court, New York would not permit the multiple weights it requires to be displayed on a supplemental label.[5] Therefore, appellants conclude, even the district court would now hold the New York scheme unlawful because the federal law, as interpreted by the Poultry Division, does not permit the multiple weights to be shown on the principal label which bears the federal markings.[6]

One answer to this contention is that there is insufficient evidence that New York would insist upon enforcing this regulation in the face of federal opposition. But a more fundamental problem with the argument is that it still assumes that the decision of the Poultry Division rejecting appellants' proposed "principal labels" should be accepted as representing the policy of the Department of Agriculture. Like the district court, we cannot accept this assump-

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5 Section 221.7 of the New York regulations provides:

> The declaration of identity, if required and the net quantity statement shall appear on the principal display panel.

6 Appellants argue that "Congress has preempted the field with respect to the text of the federally approved label," but we think the argument is more properly viewed as tending to show irreconcilable conflict than preemption.

tion in view of the appellants' failure to request a hearing at which the decision of the lower-echelon officials could be more fully explored.

Appellants attack this last aspect of the district court's decision by arguing that the Act gives the right to a hearing to one who "does not accept" the initial administrative ruling and therefore that it is improper to require them to appeal rulings which they "accept." But appellants only accept the Poultry Division's rulings for the purpose of challenging the "contrary" state regulation. While they cannot be compelled to appeal from these rulings, the strong policy against invalidating state regulatory schemes in the absence of a clear showing of irreconcilable conflict with federal law requires that this court not accept the Poultry Division's rulings without a further inquiry into their propriety. Compare *Federal Power Comm'n* v. *Arkansas Power & Light Co.*, 330 U. S. 802, reversing *per curiam* 154 F. 2d 821 (D. C. Cir. 1946).

Appellants argue that, for a number of reasons, this is an inappropriate case to require them to pursue additional remedies within the federal agency. We disagree. As the lower court pointed out, uniform and accurate weights and measures is a traditional subject of state regulation. There is nothing in the federal Act or regulations that either requires the rejection of New York's definition of "net weight" or that condemns a labeling scheme that satisfies both current administrative interpretations. The reasons given by the Poultry Division in its letters rejecting appellants' proposed labels do not necessarily indicate that the two administrative positions are in hopeless conflict. In addition, the Deputy Director of the Poultry Division, called as a witness for the plaintiffs, testified that his department had as yet made no attempt to "straighten out

any alleged differences" with the New York authorities. We conclude that on this record the two legislative schemes have not been shown to be in irreconcilable conflict.[7]

Accordingly, we affirm the order of the district court. At the same time we suggest that the administrative agencies involved in this controversy should seek to resolve this unsettled situation without delay.

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[7] The Department of Justice, in its *amicus* brief, is in accord with our view that the record here is not sufficient to establish a conflict which warrants enjoining an otherwise valid state law.

APPENDIX B

Opinion of the District Court

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

63 Civil 3085

SWIFT & COMPANY, INC. and ARMOUR AND COMPANY,

Plaintiffs,

—v.—

DON J. WICKHAM, Commissioner of Agriculture and Markets of the State of New York,

Defendant.

Before:

FRIENDLY, *Circuit Judge,*
CROAKE and WYATT, *District Judges.*

Action by packers of frozen stuffed turkeys processed outside New York State for declaratory judgment affirming their right to sell in New York for resale turkeys labelled as to weight in a manner satisfying the requirements of the United States Department of Agriculture, and seeking to enjoin the New York Commissioner of Agriculture and Markets from interfering with such sales by reason of New York's weight labelling requirements.

WILLIAM J. CONDON, New York, New York (William J. Colavito on brief), *for Swift & Company, Inc.*

E. GORDON ROBBINS (Evans, Orr, Gourlay & Pacelli, New York, New York), *for Armour and Company.*

PHILIP KAHANER and LESTER ESTERMAN (Louis J. Lefkowitz, Attorney General, for the State of New York), *for the State of New York.*

FRIENDLY, *Circuit Judge*:

Swift & Co. and Armour & Co. pack frozen stuffed turkeys in Minnesota and Wisconsin. They ship the turkeys into New York for sale to retailers who resell them to consumers. The turkeys are labelled so as to show the total weight of the stuffed bird, as required by the United States Department of Agriculture. The packers have brought this action against the Commissioner of Agriculture and Markets of New York seeking a declaration of their right to sell turkeys in New York under the federally approved label and an injunction against the New York Commissioner's interfering with such sales by enforcing § 193 of New York's Agriculture and Markets Law and regulations issued thereunder which he construes as requiring a statement of the net weight of the unstuffed turkeys as well as of the stuffed birds—a statement which the plaintiffs contend would not be federally approved or allowed.

The complaint alleged that § 193 of the Agriculture and Markets Law and action threatened by the Commissioner under it violated the plaintiffs' rights under the commerce and supremacy clauses of the Federal Constitution and the due process and equal protection clauses of the Fourteenth Amendment. Plaintiffs requested that a three-judge court be called to hear and determine the case pursuant to 28 U. S. C. § 2281. Believing that the case might be within that

section, Judge Croake, to whom the application came, caused such a court to be assembled as provided in 28 U. S. C. § 2284. For reasons that will later appear, we think it best to take what might seem the unorthodox course of discussing the merits before we address ourselves to the puzzling question, which the parties have not disputed, whether the case is appropriate for a three-judge court under § 2281.

Section 193-3 of New York's Agriculture and Markets Law provides:

> "All food and food products offered for sale at retail and not in containers shall be sold or offered for sale by net weight, standard measure or numerical count under such regulations as may be prescribed by the Commissioner."

When the action was brought, the relevant regulation, § 221.40, stated:

> "Meat, poultry and fish shall be sold or offered for sale as food at retail by net weight only."[1]

Neither the statute nor the regulation defines "net weight." The Director of the Bureau of Weights and Measures of the Department testified that he interpreted the regulation, as applied to stuffed turkeys, to require statement of the net weight both of the unstuffed and of the stuffed bird, and

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[1] This was incorporated, effective March 1, 1964, in § 221.9(c), which provides:

> "Except for immediate consumption on the premises where sold or as one of several elements comprising a ready-to-eat meal sold as a unit for consumption elsewhere than on the premises where sold, all meat, meat food products, poultry (whole or parts) and all seafood except shellfish, offered or exposed for sale or sold, as food shall be offered or exposed for sale and sold by net weight."

that, when asked, he so advised local sealers of weights and measures.

The history of the regulation, promulgated after a hearing by the Commissioner to consider an alternative containing an exception "that stuffed poultry, when plainly labeled as such and with the words 'including stuffing' appearing as part of the net weight marking of the combined poultry and stuffing may be sold or offered for sale by the net weight of the combined poultry and stuffing," leaves little doubt that this was an admissible interpretation of the regulation. We are also confident that, in view of the lack of statutory definition of "net weight," the New York courts would hold a regulation having this effect to be within the authority conferred on the Commissioner specifically by § 193-3 and more generally by § 196-a. See *Mounting & Finishing Co.* v. *McGoldrick*, 294 N. Y. 104 (1945). We further hold that the state has taken and has threatened to take action that will prevent the sale of plaintiffs' turkeys unless they comply with the regulation as so interpreted, overruling the state's unpersuasive contention that plaintiffs have been the victims of uncoordinated but uniform acts by a number of local sealers.

Plaintiffs now weigh the turkeys at their packing plants outside New York after stuffing and immediately before freezing. They do not deny they can adjust their operation so as to comply with the New York regulation as interpreted by the Commissioner, although this would allegedly involve a total of three weighings—one before stuffing, one after, and another when the giblets have been added and the completed product is placed in a Cryovac bag. Swift's witness testified that 200 birds can be weighed per hour; Armour weighs 300. Two additional weighings would thus take Armour somewhat less and Swift somewhat more than a

half minute per bird.[2] Since the birds are frozen immediately after the weighing, there would seem to be no difficulty in plaintiffs' making the extra weighings and affixing the added labels only for the approximate quantity intended for shipment to New York; in any event the record contains nothing to show this would not be practicable.

I.

The contention that New York's regulation is rendered invalid by the commerce clause alone is not substantial. The Commissioner showed that the stuffing constitutes a considerable portion of the net weight of the stuffed bird and also that there can be significant variations in the weight of stuffing in birds of the same size, even when the processing is done by such reputable packers as the plaintiffs and *a fortiori* when it is not. Hence a label showing only the net weight of the stuffed bird may not fully inform the buyer what he is getting. Protection of the public against false weights and measures or misleading statements about them is one of the oldest exercises of governmental regulatory power. "The control of weights and measures appears in the Anglo-Saxon laws, and in legislation during the next thousand years." Plucknett, A Concise History of the Common Law (1956), 448 fn. 2. The barons of the 13th century considered the subject sufficiently important for mention in the 35th Chapter of Magna Carta.[3] A weighing house

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[2] This is on the assumption that two added weighings are needed. In fact the evidence indicated that, in lieu of the present practice whereby the stuffed bird is weighed after being placed in a Cryovac bag, for which appropriate adjustment is made, it would be possible simply to weigh the unstuffed and the stuffed bird and then add a previously determined weight of the giblets. On this basis only one extra weighing of the bird would be required.

[3] "There shall be one measure of wine throughout our whole kingdom, and one measure of ale, and one measure of grain, that is the

where goods brought into and out of the city of New Amsterdam "subject to the measure either of the Skepel or Weight" must be weighed and measured "by the sworn Weighmaster and Measurer," see O'Callaghan, Laws and Ordinances of New Netherland, 174-75 (1868), was established in 1654; the local New York sealers, of whose activities Swift and Armour complain, can be traced back to the Act of June 19, 1703, Laws of the Colony of New York, 554.

That the framers of the Constitution did not intend that laws of such ancient vintage in New York and other states[4] must yield to an unexercised national authority in the case of goods coming from outside the state is obvious from the mere statement. But the point is further demonstrated by the provision in Article I, § 10, that "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports and Exports, except what may be absolutely necessary for executing its inspection Laws . . ."—a provision as to which The Federalist thought it enough to say "that the manner in which the restraint is qualified, seems well calculated at once to secure to the States a reasonable discretion in providing for the conveniency of their imports and exports; and to the United States a reasonable check against the abuse of this discretion." The Federalist No. 44. There could hardly be a fitter subject for state inspection than weights, see *Patapsco Guano Co.* v. *Board of Agriculture of North Carolina*, 171 U. S. 345, 358, 361 (1898), and the same principle that permits a state to prohibit the sale of articles bearing an improper statement as to weight allows it to insist on statements that it reasonably consid-

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London quarter, and one width of dyed cloth and of russets and of halbergets, that is two ells within the selvages; of weights, moreover, it shall be as of measure."

[4] See, e.g., the Massachusetts Act of 1647, Massachusetts Colonial Laws, pp. 199-200.

ers to be proper. It is in no way fatal to a regulation of this sort, which does not operate so as to favor local competitors, that compliance may require out-of-state manufacturers to alter their processes, when this is not unduly burdensome. The *Patapsco* case and *Savage* v. *Jones*, 225 U. S. 501 (1912), are sufficient authority. The claims under the Fourteenth Amendment are so patently baseless that we mention them only to show they were not overlooked.

II.

In contrast to the lack of merit in plaintiffs' contentions that New York's requirements violate these constitutional provisions, their argument that the Supremacy Clause forbids enforcement of New York's regulation because of the federal Poultry Products Inspection Act of 1957, 21 U. S. C. §§ 451-469, 71 Stat. 441-49, raises most serious issues, to which we now turn.

The Act contains an initial section, 21 U. S. C. § 451, making legislative findings as to the national interest in favor of wholesome poultry products and against unwholesome or adulterated ones, as to the impracticability of inspecting poultry and poultry products that enter into the stream of interstate commerce without also inspecting all poultry and poultry products processed in the same establishment, and as to the importance of protecting "interstate commerce in poultry and poultry products inspected for wholesomeness, from being adversely burdened, obstructed, or affected by uninspected poultry or poultry products" in large metropolitan markets. The second section, 21 U. S. C. § 452, declares it "to be the policy of Congress to provide for the inspection of poultry and poultry products by the inspection service as herein provided to prevent the movement in interstate or foreign commerce or in a designated major consuming area of poultry products which are un-

wholesome, adulterated, or otherwise unfit for human food." The following sections, 21 U. S. C. §§ 453-456, contain definitions, authorize the designation of major consuming areas within which federal controls will govern local as well as interstate commerce in poultry, and provide for inspection of carcasses and of the premises themselves.

The next two sections, 21 U. S. C. §§ 457 and 458, contain the provisions on which plaintiffs particularly rely. Section 457, entitled "Labeling" provides:

> "(a) *Requirements for shipping and immediate containers.*
>
> Each immediate container of any poultry product inspected under the authority of this chapter and found to be wholesome and not adulterated shall at the time such product leaves the official establishment bear, in addition to the official inspection mark, in distinctly legible form, the name of the product, a statement of ingredients if fabricated from two or more ingredients including a declaration as to artificial flavors, colors, or preservatives, if any, the net weight or other appropriate measure of the contents, the name and address of the processor and the approved plant number of the official establishment in which the contents were processed. * * * The Secretary may permit reasonable variations and grant exemptions from the foregoing labeling requirements in any manner not in conflict with the purposes of this chapter.
>
> "(b) *False or misleading labeling.*
>
> The use of any written, printed or graphic matter upon or accompanying any poultry product inspected or required to be inspected pursuant to the provisions of this chapter or the container thereof which is false or misleading in any particular is prohibited. No poul-

try products inspected or required to be inspected pursuant to the provisions of this chapter shall be sold or offered for sale by any person, firm, or corporation under any false or deceptive name; but established trade name or names which are usual to such products and which are not false and deceptive and which shall be approved by the Secretary are permitted. If the Secretary has reason to believe that any label in use or prepared for use is false or misleading in any particular, he may direct that the use of the label be withheld unless it is modified in such manner as the Secretary may prescribe so that it will not be false or misleading. If the person using or proposing to use the label does not accept the determination of the Secretary, he may request a hearing, but the use of the label shall, if the Secretary so directs, be withheld pending hearing and final determination by the Secretary. Any such determination by the Secretary shall be conclusive unless within thirty days after the receipt of notice of such final determination the person adversely affected thereby appeals to the United States court of appeals for the circuit in which he has his principal place of business or to the United States Court of Appeals for the District of Columbia Circuit."

Section 458 prohibits various acts, including:

"(c) Falsely making or issuing, altering, forging, simulating, or counterfeiting any official inspection certificate, memorandum, mark, or other identification, or device for making such mark or identification, used in connection with the inspection of poultry or poultry products under this chapter, or causing, procuring, aiding, assisting in, or being a party to, such false making, issuing, altering, forging, simulating, or counterfeiting, or knowingly possessing, without promptly notifying

the Secretary of Agriculture or his representative, uttering, publishing, or using as true, or causing to be uttered, published, or used as true, any such falsely made or issued, altered, forged, simulated, or counterfeited official inspection certificate, memorandum, mark, or other identification, or device for making such mark or identification, or representing that any poultry or poultry product has been officially inspected under the authority of this chapter when such poultry or poultry product has in fact not been so inspected.

"(d) Using in commerce, or in a designated major consuming area, a false or misleading label on any poultry product."

Pursuant to 21 U. S. C. § 463, the Secretary of Agriculture has issued regulations to carry out the Poultry Inspection Act, the most pertinent of which we quote in the margin.[5]

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[5] 7 CFR § 81.125:

"Except as may be authorized by the Administrator with respect to shipment of products between official establishments, each shipping container and each immediate container of any product shall at the time it leaves the official establishment bear approved labels containing information in accordance with the provisions set forth in §§ 81.126 to 81.146, inclusive, and the act."

7 CFR § 81.127:

"No label, except printer's proofs bearing official identification shall be printed until the printer's proof or a photostatic copy has been found by the Administrator to be acceptable . . . "

7 CFR § 81.130:

"(a) Each label approved for use on an immediate container for poultry products shall bear in distinctly legible form the following information:

(1) The common or usual name of the poultry product.

(2) A statement of ingredients if fabricated from two or more ingredients, including a declaration as to artificial flavors,

It is undisputed that the Administrator has approved labels for plaintiffs' frozen stuffed turkeys which show only

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colors or preservatives, if any. Such ingredients shall be listed by their common or usual names in the order of their descending proportions. * * *

(3) The net weight or other appropriate measure of the contents, except that the Administrator may approve the use of labels for certain types of immediate containers which do not bear the net weight: . . . The net weight marked on containers of poultry products shall be the net weight of the poultry products and shall not include the weights of the wet or dry packaging materials and giblet wrapping materials.

(4) The name and address of the packer or distributor and when the name of the distributor is shown, it shall be qualified by such term as 'packed for,' 'distributed by,' or 'distributors.'

(5) The official inspection mark.

* * * * *

"(c) Any label which bears the official inspection mark or any written, printed or graphic matter upon or accompanying any poultry product inspected or required to be inspected pursuant to the provisions of the regulations shall not bear any statement that is false or misleading. If the Administrator has reason to believe that any label in use or prepared for use is false or misleading in any particular, he may direct that the use of the label be withheld unless it is modified in such manner as the Administrator may prescribe so that it will not be false or misleading. If the person using or proposing to use the label does not accept the determination of the Administrator, he may request a hearing, but the use of the label shall, if the Administrator so directs, be withheld pending hearing and final determination by the Administrator. Any person so denied the approval of any label shall be notified promptly of the reasons for the denial. A written application for a hearing with respect to the denial may be filed by said person with the Administrator within 10 days after notice of the denial. Such petition shall state specifically the errors alleged to have been made by the Administrator in denying approval of the label. After consideration of the facts adduced at the hearing, any determination with respect to the matter by the Administrator shall be conclusive unless, within 30 days after the receipt of notice of such final determination, the person adversely affected thereby appeals to the United States Court of Appeals for the Circuit in which he has his principal place of business, or to the United States Court of Appeals for the District of Columbia Circuit. . . ."

the net weight of the stuffed bird. In May, 1963, Swift sought approval of a "revised net weight statement showing separate weight for turkey, dressing and total weight." The Head of the Poultry Products Section, Inspection Branch, Poultry Division, returned the proposed labels with adverse comments. A letter amplified the reasons. These included the impracticability of the consumer's verifying the separate net weights due to absorption of juices by the dressing during defrosting, the possibility that the weight slip attached to the bird at the first weighing might become detached so that wrong weights might be shown, and the danger of bacterial contamination during the time needed for the added weighings. An application by Armour for approval of a label showing separately the net weight of the turkey and of the stuffing but without a total was returned with the comment "The net weight of the poultry product including the stuffing must be shown in lieu of separate net weights." Neither Swift nor Armour requested a hearing as permitted by the statute and the regulations.

A.

We must first consider whether by the mere enactment of the Poultry Inspection Act, Congress so "occupied the field" as to oust all weight regulation by states into which federally inspected poultry or poultry products are shipped, irrespective of the consistency of the state and the federal regulation. Some illumination is afforded by a series of cases that arose shortly after enactment of the Pure Food and Drug Act. The first, *Savage* v. *Jones, supra,* held that the provisions of § 8 prohibiting a package or label that contained false or misleading statements of the contents, 34 Stat. 768, 770 (1906), did not invalidate a state statute requiring a tag or label affirmatively disclosing the ingredients. In contrast, at the next term, the Court decided that

when the Secretaries of the Treasury, of Agriculture and of Commerce and Labor, had found that a syrup was not misbranded if labelled "corn syrup with cane flavor," a state could not require cans of the syrup sold at retail to be labelled instead "Glucose flavored with Refiner's Syrup." *McDermott* v. *Wisconsin*, 228 U. S. 115 (1913); the Court had no occasion to consider whether the state might require this as an additional label. The trilogy was completed by *Corn Products Refining Co.* v. *Eddy*, 249 U. S. 427 (1919), holding that federal approval of labelling as corn syrup did not prevent a state from requiring that the cans also bear a statement of ingredients.

Multiplication of references to Supreme Court decisions in this general area would serve no useful purpose; it suffices for the present to cite the last bracketing pair, both decided by the narrowest of margins. *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132 (1963), sustained California's prohibition of the sale of avocados containing less than 8% of oil by weight, as applied to Florida avocados whose maturity on picking was already controlled by compliance with regulations promulgated by the Secretary of Agriculture with special reference to Florida avocados, and which were certified by a Federal-State Inspection Service pursuant to regulations issued by the Secretary under the Agricultural Adjustment Act, 7 U. S. C. §§ 601 *et seq.*, 48 Stat. 31 (1933). The Court reaffirmed that "The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." 373 U. S. at 142. As against this *Cloverleaf Butter Co.* v. *Patterson*, 315 U. S. 148 (1942), had prohibited Alabama from seizing packing

stock butter, not meeting the state standard, which had been acquired by an Alabama processor for use in manufacturing renovated butter for transportation in interstate commerce under federal regulations, Internal Revenue Code of 1939, §§ 2320-27, 53 Stat. 252. The *Florida Avocado Growers* majority distinguished *Cloverleaf* on the basis that "Congressional regulation of one end of the stream of commerce does not, ipso facto, oust all state regulation at the other end," 373 U. S. at 145, and pointed to the differences recognized in *Cloverleaf* "between a confiscation which interferes with production under federal supervision and confiscation after production because of a higher standard demanded by a state for its consumers. The latter type is permissible under all the authorities." 315 U. S. at 162.[6] This distinction necessarily recognizes that it is not inevitably unconstitutional for a state desiring "a higher standard" for the protection of its consumers to confront a manufacturer in another state with the alternatives of taking steps not required by applicable federal law or not selling his goods in the enacting state.

The general scheme of the Poultry Products Inspection Act does not suggest a Congressional purpose to create an exclusive system of regulation of the marketing of poultry; in particular it does not suggest an intent to oust the states of their historic undertaking to safeguard their people from improper statements of weight. The legislative findings, 21 U. S. C. § 451, and the declaration of policy, 21 U. S. C. § 452, speaking of the need for protection against unwholesome poultry products and of the importance of providing for inspection "to prevent the movement in . . . commerce . . . of poultry products which are unwholesome, adulterated

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[6] The *Avocado Growers* dissenters criticized this statement as a reference to "the uncited 'all the authorities,' which appear to be non-existent." 373 U. S. at 174.

or otherwise unfit . . .", do not carry the implication that any of these objectives would be frustrated if the states were to impose supplemental regulations, at the end of the stream of commerce, to insure accomplishment of these ends—much less if the receiving states should further regulate a subject which the federal Act touches so slightly as weights. While the Act contains the quoted provisions as to labelling, these are merely incidental to the primary provisions for inspection of poultry products. Passage of the Act did not result from any belief on the part of Congress that there were serious weight or labelling abuses demanding correction; neither the legislative findings nor the declaration of policy make any reference to these subjects. In the entire statute, stretching over nine pages in the Statutes at Large, the sole reference to disclosure of weight consists of one short clause. The House Report, No. 465, 85th Cong., 1st Sess. 1957; 2 U. S. Code Cong. & Adm. News 1957, pp. 1632-33, and the Senate Report, No. 195, 85th Cong., 1st Sess., 1957, say nothing on the subject save for a passing mention of a statement of "the quantity" in paraphrasing the labelling section where this clause appears.

Insofar as plaintiffs contend that the extra weighings needed to meet New York's requirement frustrates the primary Congressional purpose by impairing the wholesomeness of the product, we reject the claim as wholly contrary to the evidence. The weighings would add something like half a minute to the 45 minutes in which the birds are now exposed between their bath in ice slush and their entry into the freezer; Armour's plant superintendent admitted, with commendable candor, that the small additional time and handling would have no adverse effect.[7]

[7] It is true that danger of contamination resulting from additional weighings was one of the reasons given in the letter of an official of the Department of Agriculture explaining to Swift the rejection of its labelling proposal. But since this reason was not

For reasons already indicated in part, we likewise cannot conclude that a state requirement of a more detailed declaration of weights was ruled out by mere enactment of the federal statute. Although the Secretary of Agriculture may have reasonable leeway to determine what net weight shall be shown on the official federal label and the label provisions of the Act recognize the necessity of protecting the integrity of the "official inspection mark" (21 U. S. C. § 454(j)), and contain a normal prohibition of "false and misleading labeling," there is no basis for assuming that any further statement as to weight that a state may require would necessarily affect the integrity of the official inspection mark or be "false or misleading." To borrow from Mr. Justice Brennan's opinion in the *Florida Avocado Growers* case, the manner of stating the weight of frozen stuffed turkeys in various markets "seems to be an inherently unlikely candidate for exclusive federal regulation," 373 U. S. at 143. There is here a complete absence of the "special and peculiar history" that led the Court to conclude in *Rice* v. *Santa Fe Elevators Corp.*, 331 U. S. 218, 232 (1947), that a more pervasive but non-conflicting state regulation must yield to the amended federal Warehouse Act, 46 Stat. 1463 (1931). There is a marked contrast with the importance attached in *Campbell* v. *Hussey*, 368 U. S. 297 (1961), to the expressed intention to establish *uniform* standards in the Tobacco Inspection Act, 49 Stat. 731 (1935). And the problem is in no wise comparable with that in *Napier* v. *Atlantic Coast Line R.R.*, 272 U. S. 605 (1926), where the decision as to the exclusivity of the Boiler Inspection Act must have been influenced by the paralyzing effect on railroads from

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among those given in the official statement of rejection and since there had been no hearings on the subject, this informal comment cannot be taken as an authoritative statement of the Secretary's position. In any event we should be forced to reject it as unsupported by substantial evidence.

prescription by each state of the safety devices obligatory on locomotives that would pass through many of them. Compare *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761 (1945); *Bibb* v. *Navajo Freight Lines, Inc.*, 359 U. S. 520 (1959). Here, as has been noted, plaintiffs will encounter no serious manufacturing problem in conforming to New York's requirements even though the federal authorities and other states have not gone so far. We conclude that plaintiffs cannot prevail on their general argument as to federal occupation of the field.

B.

We must thus examine not only the precise language of the Poultry Products Inspection Act but also the regulations issued and actions taken thereunder to determine whether an irreconcilable conflict has arisen between what the United States has commanded and what New York requires. *Cloverleaf Butter Co.* v. *Patterson*, *supra*, 315 U. S. at 155-56; *Florida Lime & Avocado Growers, Inc.* v. *Paul*, *supra*, 373 U. S. at 146.

We begin by observing that, as we understand New York's position, it does not demand any modification in the weight label adjacent to the Department of Agriculture's official inspection stamp; we shall assume New York would be satisfied, as indeed it must be, so long as somewhere on the container there is a statement of the net weight of the bird before stuffing, on which, if need be, any federal responsibility could be expressly disclaimed. Such a presentation should go a long way toward satisfying the concern expressed in the letter of the Head of the Poultry Products Section of the Department of Agriculture lest an inaccurate statement should occur when an occasional bird, weighed before stuffing, loses its tag in the process—although we would indeed suppose that a technology that has been able

to develop computers, space satellites, and supersonic airplanes could find means to conquer this problem.[8] The federally approved label, adjacent to the inspection mark, thus need contain only what it now contains—a recital of the net weight of the stuffed bird as it enters the freezing chamber.

The question thus becomes whether the United States has prohibited plaintiffs from affixing an additional label that will meet New York's requirements. Reading the statute in the manner prescribed in cases of this sort, we find no "unambiguous congressional mandate to that effect." 373 U. S. at 147. Although we assume that the Secretary of Agriculture or his delegate, the Administrator of the Agricultural Marketing Service, is empowered to construe the required statement of "net weight," § 457(a), as referring to the net weight of the stuffed bird, this alone would not outlaw further statements concerning weight so long as these do not obscure or detract from the force of the federally approved label, and so long as they are not presented so as to imply federal approval. Indeed, this view is supported by regulation 81.127, footnote 5 *supra*, which, although confusingly worded, shows concern only for labels which bear official identification. Consistent with this, we read the communications from the Department as merely rejecting the particular labels submitted for approval and not as attempting to rule broadly that any supplementary labelling of weight in addition to that satisfying the Department would be unlawful.

Neither can we sustain Swift and Armour on the basis that the communications are a finding that a supplementary

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[8] The Department's concern that the purchaser could not precisely verify the statement of weight before stuffing since the stuffing might absorb some of the bird's juices during defrosting would seem a worry more appropriate for New York. Apparently New York has decided that a statement whose policing may require reasonable tolerance is better than none.

label satisfying the demands of the New York Commissioner would inevitably be so misleading as to fall within the proscription of the federal statute. When the alleged inconsistency of a state with a federal regulation is not apparent on the face of the two commands but hinges on a factual determination, a citizen desiring freedom from the state regulation does not discharge his burden by obtaining a letter from a subordinate federal official—at least when Congress has laid out a fact-finding procedure as to which the state could be given notice and an opportunity to be heard. Cf. *Federal Power Comm'n* v. *Arkansas Power & Light Co.*, 330 U. S. 802 (1947), reversing *per curiam* the decision of the Court of Appeals for the District of Columbia, 156 F. 2d 821 (1946). The statute, § 457(b), and the regulations, 7 C. F. R. § 81.130(c), provide that a person aggrieved by a determination may request a hearing and, if the preliminary determination is then adhered to, may obtain judicial review. Swift and Armour were obliged at least to pursue the former remedy if this was necessary to obtain a clear determination that any label satisfactory to New York would be banned by the federal Administrator as misleading. We think it highly unlikely that upon a departmental hearing, with New York given the notice that proper respect to its authority would demand, anyone could reasonably find that a separate statement of the weight of the unstuffed bird would be false or misleading. To the contrary, we are convinced by the evidence that the additional statement would make the total impression less misleading than simply having a label which, as was testified, in one instance showed a net weight of 7¼ pounds for a stuffed turkey which, after defrosting, was found to contain 2⅛ pounds of stuffing—even if an occasional turkey might unwittingly strut under another's tag.

III.

We now reach the question, postponed at the outset, whether this is a case seeking an "injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute . . . upon the ground of the unconstitutionality of such statute," 28 U. S. C. § 2281, as to which alone a court of three judges is required. Before March 26, 1962, when the Supreme Court decided *Kesler* v. *Department of Public Safety of Utah*, 369 U. S. 153, the question would have been speedily answered in the negative. Since the claims that application of the New York statute violates the commerce clause or the Fourteenth Amendment are insubstantial, the serious questions that remain are of federal statutory preemption and of conflict between federal and state enactments; these had not been considered to be claims of "unconstitutionality" within § 2281, even though an elegant statement of the argument would end with a reference to the supremacy clause of Article VI of the Constitution. See *Kesler* v. *Department of Public Safety of Utah, supra*, 369 U. S. at 175-76 and fn. 5 (dissenting opinion of the Chief Justice) (1962); Wright, Federal Courts 164 (1963). But, in Professor Wright's language, the *Kesler* decision qualified "the cases which seemed to so hold with a very subtle rule," namely, that § 2281 was applicable when "no question of statutory construction, either of a state or a federal enactment, is in controversy" so that the case "presents a sole, immediate constitutional question," as distinguished from cases "which presented issues of statutory construction even though perhaps eventually leading to a constitutional question," 369 U. S. at 157-58.

When we reflect on what we have written, we think we have indeed construed the Poultry Products Inspection Act,

both to determine whether it was meant to oust all state regulation of weights *ex proprio vigore* and to decide whether it bans the statement as to weight on which New York insists. If a problem of statutory construction exists whenever "there is a fair contest between two readings, neither of which comes without respectable title deeds . . . ", Frankfurter, Some Reflections on the Reading of Statutes, in Of Law and Men 45 (1956), it would seem that even under *Kesler* this was a case for a single judge, although Judge Croake in calling for a three-judge court and the Chief Judge of the Circuit in responding to his call could hardly have been expected to foresee just how the case would develop. But the issue is not that simple. The *Kesler* case itself required consideration of the purpose and effect of § 17 of the Bankruptcy Act—an issue on which, indeed, the Justices did not agree. The question therefore is not whether we have engaged in construction of a federal statute *simpliciter*, but whether we have engaged in so much more construction than in *Kesler* as to make that ruling inapplicable.[9] If we were obliged to answer that question, we would say we had. But we see no need to assume a task for which our litmus paper is not sufficiently sensitive to permit an assured answer, and as to which the consequences of a wrong decision in one direction might be so serious. Although a single district judge is without power to act in a case requiring three judges, the opposite is not true, *Phillips* v. *United States*, 312 U. S. 246, 254 (1941); *Public Service Comm. of Missouri* v. *Brashear Freight Lines, Inc.*, 312

[9] *United States* v. *Georgia Public Service Comm'n*, 371 U. S. 285, 287 (1963), in which the Court requested counsel to brief and argue the applicability of *Kesler*, 369 U. S. 882 (1962), went off on the point that the case presented a substantial question of conflict with the Constitution itself. See also *Borden Co.* v. *Liddy*, 309 F. 2d 871, 874 (8 Cir. 1962), cert. denied, 372 U. S. 953 (1963), and Note, The Three-Judge District Court: Scope and Procedure under Section 2281, 77 Harv. L. Rev. 299, 313-15 (1963), criticizing the *Kesler* decision.

U. S. 621, 626 (1941).[10] Since a return of the case to Judge Croake would result in an invalid order if the return was erroneous, whereas the only consequence of erroneous retention of jurisdiction by the three-judge court is that the appeal should be taken to the Court of Appeals rather than to the Supreme Court, an uncertainty against which the plaintiffs may protect themselves by timely appeals to both courts, see also *Bailey* v. *Patterson*, 369 U. S. 31 (1962); *Turner* v. *City of Memphis*, 369 U. S. 350 (1962), we direct that judgment dismissing the complaint be entered in the name of the three-judge court, at the same time certifying out of abundant caution that Judge Croake individually arrived at the same conclusion that we have reached collectively.

The complaint is dismissed.

HENRY J. FRIENDLY,
U. S. C. J.

THOMAS F. CROAKE,
U. S. D. J.

INZER B. WYATT,
U. S. D. J.

June 10, 1964.

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[10] It is not altogether plain whether the rationale is that the two additional judges are surplus, see *Healy* v. *Ratta*, 67 F. 2d 554, 556 (1 Cir. 1933), reversed on other grounds, 292 U. S. 263 (1934); *O'Malley* v. *United States*, 128 F. 2d 676, 687 (8 Cir. 1942), rev'd on other grounds, 317 U. S. 412 (1943), a theory that would create problems if the district judge to whom the application was initially presented was in disagreement; cf. *Cannonball Transp. Co.* v. *American Stages, Inc.*, 53 F. 2d 1050 (S. D. Ohio 1931); *United States* v. *Query*, 37 F. Supp. 972, 977 (E. D. So. Car.), aff'd 121 F. 2d 631 (4 Cir.), cert. denied, 314 U. S. 685 (1941), cert. granted, 316 U. S. 653, vacated and remanded, 316 U. S. 486 (1942); or that the three judges are sitting as a district court *in banc*, 28 U. S. C. § 132, see *International Longshoremen's Union* v. *Ackerman*, 82 F. Supp. 65, 93-94 (D. Hawaii, 1948), rev'd on other grounds, 187 F. 2d 860 (9 Cir. 1951); and *Wilson & Co.* v. *Freeman*, 179 F. Supp. 520, 524 (D. Minn. 1959); or something else.

APPENDIX C

Statutes

AGRICULTURE AND MARKETS LAW OF THE STATE OF NEW YORK

§ 193. *Method of sale of food and food products*

1. Definition of "food" and "food product". The terms "food" and "food product" as used in this section shall include all material, solid, liquid or mixed, whether simple or compound, used or intended for consumption by human beings or domestic animals normally kept as household pets and shall also include all substances or ingredients to be added thereto for any purpose.

2. All food and food products which are sold, offered or exposed for sale by wholesalers, packers, distributors or jobbers shall be sold or offered for sale by net weight, numerical count or standard measure, whichever term shall be applicable, and shall be plainly marked by such person or persons offering the food or food products for sale, in such form or manner as may be prescribed by the commissioner, except that it shall not be necessary to so mark meat, meat products or fish, except shellfish in natural form, provided the net weight be stated on a written invoice and on the shipping container of the meat, meat product or fish.

3. All food and food products offered for sale at retail and not in containers shall be sold or offered for sale by net weight, standard measure or numerical count under such regulations as may be prescribed by the commissioner.

4. All food and food products which are packaged or wrapped by the retailer in advance of being exposed or offered for sale by the retailer shall be accurately marked

in such form or manner as may be prescribed by the commissioner, with (a) the net weight or standard measure or numerical count; (b) the selling price per pound or unit of standard measure, and (c) the total selling price.

5. Wherever food or food products are packaged or wrapped for sale by a retailer in advance of being sold or offered for sale, an accurate computing scale shall be maintained so placed as to be easily available to customers.

6. This section shall not apply to sales of (a) eggs, fresh fruits, fresh vegetables, grains and nuts; (b) milk and cream as set forth in section one hundred ninety-one of this chapter; (c) malt beverages as set forth in section one hundred ninety-two-c of this chapter; (d) bread, as set forth in section one hundred ninety-three-a of this chapter; (e) frozen desserts as set forth in section one hundred ninety-three-d of this chapter; (f) alcoholic beverages; and (g) drugs and pharmaceuticals. Added L. 1962, c. 770, § 2; amended L. 1963, c. 377, eff. April 16, 1963.

PUBLIC LAW 85-172

85TH CONGRESS, S. 1747

August 28, 1957

AN ACT

—71 Stat. 441—

To provide for the compulsory inspection by the United States Department of Agriculture of poultry and poultry products.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act [Poultry Products Inspection Act] may be cited as the "Poultry Products Inspection Act".

LEGISLATIVE FINDING

SEC. 2. Wholesome poultry products are an important source of the Nation's total supply of food. Such products are consumed throughout the Nation and substantial quantities thereof move in interstate and foreign commerce. Unwholesome and adulterated poultry products in the channels of interstate or foreign commerce, are injurious to the public welfare, adversely affect the marketing of wholesome poultry products, result in sundry losses to producers, and destroy markets for wholesome poultry products. The marketing of wholesome poultry products is affected with the public interest and directly affects the welfare of the people. All poultry and poultry products which have or are required to have inspection under this Act are either in the current of interstate or foreign commerce or directly affect such commerce. That part that enters directly into the current of interstate or foreign commerce cannot be effectively inspected and regulated without also inspecting and regu-

lating all poultry and poultry products processed or handled in the same establishment.

The great volume of poultry products required as an article of food for the inhabitants of large centers of population may directly affect the movement of poultry and poultry products in interstate commerce. To protect interstate commerce in poultry and poultry products inspected for wholesomeness, from being adversely burdened, obstructed, or affected by uninspected poultry or poultry products, major consuming areas where poultry or poultry products are handled or consumed in such volume as to affect the movement of inspected poultry or poultry products in interstate commerce should be designated by the Secretary pursuant to the provisions of this Act.

DECLARATION OF POLICY

SEC. 3. It is hereby declared to be the policy of Congress to provide for the inspection of poultry and poultry products by the inspection service as herein provided to prevent the movement in interstate or foreign commerce or in a designated major consuming area of poultry products which are unwholesome, adulterated, or otherwise unfit for human food.

DEFINITIONS

SEC. 4. For purposes of this Act—

(a) The term "commerce" means commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same State or the District of Columbia, but through any place outside thereof; or within the District of Columbia.

(b) The term "Secretary" means the Secretary of Agriculture.

(c) The term "person" means any individual, partnership, corporation, association, or any other business unit.

(d) The term "poultry" means any live or slaughtered domesticated bird.

—71 Stat. 442—

(e) The term "poultry product" means any poultry which has been slaughtered for human food from which the blood, feathers, feet, head, and viscera have been removed in accordance with rules and regulations promulgated by the Secretary, any edible part of poultry, or, unless exempted by the Secretary, any human food product consisting of any edible part of poultry separately or in combination with other ingredients.

(f) The term "wholesome" means sound, healthful, clean, and otherwise fit for human food.

(g) The term "unwholesome" means:

(1) Unsound, injurious to health, or otherwise rendered unfit for human food.

(2) Consisting in whole or in part of any filthy, putrid, or decomposed substance.

(3) Processed, prepared, packed, or held under unsanitary conditions whereby a poultry carcass or parts thereof or any poultry product may have become contaminated with filth or whereby a poultry product may have been rendered injurious to health.

(4) Produced in whole or in part from poultry which has died otherwise than by slaughter.

(5) Packaged in a container composed of any poisonous or deleterious substance which may render the contents injurious to health.

(h) The term "adulterated" shall apply to poultry and poultry products under one or more of the following circumstances:

(1) If they bear or contain any poisonous or deleterious substance which may render them injurious to health; but, in case the substance is not an added substance, such poultry and poultry products shall not be considered adulterated under this clause if the quantity of such substance in such poultry and poultry products does not ordinarily render them injurious to health.

(2) If they bear or contain any added poisonous or added deleterious substance, unless such substance is permitted in their production or unavoidable under good manufacturing practices as may be determined by rules and regulations hereunder prescribed by the Secretary or other provisions of Federal law limiting or tolerating the quantity of such added substance on or in such poultry and poultry products: *Provided,* That any quantity of such added substance exceeding the limits so fixed shall also be deemed to constitute adulteration.

(3) If any substance has been substituted, wholly or in part, therefor.

(4) If damage or inferiority has been concealed in any manner.

(5) If any valuable constituent has been in whole or in part omitted or abstracted therefrom.

(6) If any substance has been added thereto or mixed or packed therewith so as to increase its bulk or weight, or reduce its quality or strength, or make it appear better or of greater value than it is.

(i) The term "inspector" means: (1) an employee or official of the United States Government authorized by the Sec-

retary to inspect poultry and poultry products under the authority of this Act, or (2) any employee or official of any State government authorized by the Secretary to inspect poultry and poultry products under authority of this Act, under an agreement entered into between the Secretary and the appropriate State agency.

(j) The term "official inspection mark" means the symbol, formulated pursuant to rules and regulations prescribed by the Secretary, stating that the product was inspected.

(k) The term "inspection service" means the official Government service within the Department of Agriculture
—71 Stat. 443—
designated by the Secretary as having the responsibility for carrying out the provisions of this Act.

(l) The terms "container" or "package" include any box, can, tin, cloth, plastic, or any other receptacle, wrapper, or cover.

(m) The term "official establishment" means any establishment as determined by the Secretary at which inspection of the slaughter of poultry, or the processing of poultry products, is maintained under the authority of this Act.

(n) The term "label" means any written, printed, or graphic material upon the shipping container, if any, or upon the immediate container, including but not limited to an individual consumer package, of the poultry product, or accompanying such product.

(o) The term "shipping container" means any container used or intended for use in packaging the product packed in an immediate container.

(p) The term "immediate container" includes any consumer package; or any other container in which poultry

carcasses or poultry products, not consumer packaged, are packed.

DESIGNATION

SEC. 5. Upon application by any appropriate State or local official or agency of a substantial portion of any major consuming area or upon application by an appropriate local poultry industry group in such an area, where the Secretary has reason to believe that poultry or poultry products are handled or consumed in such volume as to affect, burden, or obstruct the movement of inspected poultry products in interstate commerce, the Secretary shall conduct a public hearing to ascertain whether or not it will tend to effectuate the purposes of this Act for such area to be subject to the provisions of this Act. If after public hearing the Secretary finds that poultry or poultry products are handled or consumed in such volume as to affect, burden, or obstruct the movement of inspected poultry products in commerce and that the designation of such area will tend to effectuate the purposes of this Act, he shall by order designate such area and prescribe the provisions of this Act which shall be applicable thereto and grant such exemptions therefrom as he determines practicable. Such designation [Publication in F. R.] shall not become effective until six months after the notice thereof is published in the Federal Register. On and after the effective date of such designation, all poultry and poultry products processed, sold, received, or delivered in any such area shall be subject to the provisions of this Act.

ANTE MORTEM AND POST MORTEM INSPECTION, REINSPECTION, AND QUARANTINE

SEC. 6. (a) For the purpose of preventing the entry into or flow or movement in commerce or a designated major consuming area of any poultry product which is unwholesome or adulterated, the Secretary shall, where and to the extent

considered by him necessary, cause to be made by inspectors ante mortem inspection of poultry in any official establishment processing poultry or poultry products for commerce or in, or for marketing in a designated city or area.

(b) The Secretary, whenever processing operations are being conducted, shall cause to be made by inspectors post mortem inspection of the carcass of each bird processed, and at any time such quarantine, segregation, reinspection as he deems necessary of poultry and poultry products in each official establishment processing such poultry or poultry products for commerce or in, or for marketing in a designated city or area.

—71 Stat. 444—

(c) All poultry carcasses and parts thereof and poultry products found to be unwholesome or adulterated shall be condemned and shall, if no appeal be taken from such determination of condemnation, be destroyed for human food purposes under the supervision of an inspector: *Provided*, That carcasses, parts, and products, which may by reprocessing be made not unwholesome and not adulterated, need not be so condemned and destroyed if so reprocessed under the supervision of an inspector and thereafter found to be not unwholesome and not adulterated. If an appeal be taken from such determination, the carcasses, parts, or products shall be appropriately marked and segregated pending completion of an appeal inspection, which appeal shall be at the cost of the appellant if the Secretary determines that the appeal is frivolous. If the determination of condemnation is sustained the carcasses, parts, and products shall be destroyed for human food purposes under the supervision of an inspector.

SANITATION, FACILITIES, AND PRACTICES

SEC. 7. (a) Each official establishment slaughtering poultry or processing poultry products for commerce or in

or for marketing in a designated major consuming area shall have such premises, facilities, and equipment, and be operated in accordance with such sanitary practices, as are required by regulations promulgated by the Secretary for the purpose of preventing the entry into or flow or movement in commerce or in a designated major consuming area, of poultry products which are unwholesome or adulterated.

(b) The Secretary shall refuse to render inspection to any establishment whose premises, facilities, or equipment, or the operation thereof, fail to meet the requirements of this section.

LABELING

SEC. 8. (a) Each shipping container of any poultry product inspected under the authority of this Act and found to be wholesome and not adulterated, shall at the time such product leaves the official establishment bear, in distinctly legible form, the official inspection mark and the approved plant number of the official establishment in which the contents were processed. Each immediate container of any poultry product inspected under the authority of this Act and found to be wholesome and not adulterated shall at the time such product leaves the official establishment bear, in addition to the official inspection mark, in distinctly legible form, the name of the product, a statement of ingredients if fabricated from two or more ingredients including a declaration as to artificial flavors, colors, or preservatives, if any, the net weight or other appropriate measure of the contents, the name and address of the processor and the approved plant number of the official establishment in which the contents were processed. The name and address of the distributor may be used in lieu of the name and address of the processor if the approved plant number is used to identify the official establishment in which the poultry product

was prepared and packed. The Secretary may permit reasonable variations and grant exemptions from the foregoing labeling requirements in any manner not in conflict with the purposes of this Act.

(b) The use of any written, printed or graphic matter upon or accompanying any poultry product inspected or required to be inspected pursuant to the provisions of this Act or the container thereof which is false or misleading in any particular is prohibited. No poultry products inspected or required to be inspected pursuant to the provisions of this Act shall be sold or offered for sale by any person, firm, or corporation under any false or deceptive name; but established trade name or names which are usual to such products and which are not false and deceptive and which shall be approved by the Secretary are permitted. If the Secretary has reason to believe that any label in use or prepared for use is false or misleading in any particular, he may direct that the use of the label be withheld unless it is modified in such manner as the Secretary may prescribe so that it will not be false or misleading. If the person using or proposing to use the label does not accept the determination of the Secretary, he may request a hearing, but the use of the label shall, if the Secretary so directs, be withheld pending hearing and final determination by the Secretary. Any such determination by the Secretary shall be conclusive unless within thirty days after the receipt of notice of such final determination the person adversely affected thereby appeals to the United States court of appeals for the circuit in which he has his principal place of business or to the United States Court of Appeals for the District of Columbia Circuit. The provisions of section 204 of the Packers and Stockyards Act of 1921 [42 Stat. 162], as amended [7 U. S. C. 194], shall be applicable to appeals taken under this section.

—71 Stat. 445—

PROHIBITED ACTS

SEC. 9. The following acts or the causing thereof are hereby prohibited:

(a) The processing, sale or offering for sale, transportation, or delivery or receiving for transportation, in commerce or in a designated major consuming area of any poultry product, unless such poultry product has been inspected for wholesomeness and unless the shipping container, if any, and the immediate container are marked in accordance with the provisions of this Act.

(b) The sale or other disposition for human food of any poultry or poultry product which has been inspected and declared to be unwholesome or adulterated under this Act.

(c) Falsely making or issuing, altering, forging, simulating, or counterfeiting any official inspection certificate, memorandum, mark, or other identification, or device for making such mark or identification, used in connection with the inspection of poultry or poultry products under this Act, or causing, procuring, aiding, assisting in, or being a party to, such false making, issuing, altering, forging, simulating, or counterfeiting, or knowingly possessing, without promptly notifying the Secretary of Agriculture or his representative, uttering, publishing, or using as true, or causing to be uttered, published, or used as true, any such falsely made or issued, altered, forged, simulated, or counterfeited official inspection certificate, memorandum, mark, or other identification, or device for making such mark or identification, or representing that any poultry or poultry product has been officially inspected under the authority of this Act when such poultry or poultry product has in fact not been so inspected.

(d) Using in commerce, or in a designated major consuming area, a false or misleading label on any poultry product.

(e) The use of any container bearing an official inspection mark except for the poultry product in the original form in which it was inspected and covered by said mark unless the mark is removed, obliterated, or otherwise destroyed.

(f) The refusal to permit access by any duly authorized representative of the Secretary, at all reasonable times, to the premises of an establishment engaged in processing poultry or poultry products for commerce, or in or for marketing in a designated major consuming area, upon presentation of appropriate credentials.

(g) The refusal to permit access to and the copying of any record as authorized by section 11 of this Act.

—71 Stat. 446—

(h) The using by any person to his own advantage, or revealing, other than to the authorized representatives of the Government in their official capacity, or to the courts when relevant in any judicial proceeding under this Act, any information acquired under the authority of this Act, concerning any matter which as a trade secret is entitled to protection.

(i) Delivering, receiving, transporting, selling, or offering for sale or transport for human consumption any slaughtered poultry or any part thereof, separately or in combination with other ingredients (other than poultry products as defined in this Act), in commerce or from an official establishment or in a designated major consuming area, except as may be authorized by and pursuant to rules and regulations prescribed by the Secretary.

COMPLETE COVERAGE OF OFFICIAL ESTABLISHMENTS

SEC. 10. No establishment processing poultry or poultry products for commerce or in or for marketing in a desig-

nated major consuming area shall process any poultry or poultry product except in compliance with the requirements of this Act.

RECORDS OF INTERSTATE SHIPMENT

SEC. 11. For the purpose of enforcing the provisions of this Act, persons engaged in the business of processing, transporting, shipping, or receiving poultry slaughtered for human consumption or poultry products in commerce or in a designated major consuming area, or holding such products so received shall maintain records showing, to the extent that they are concerned therewith, the receipt, delivery, sale, movement, or disposition of poultry and poultry products and shall, upon the request of a duly authorized representative of the Secretary, permit him at reasonable times to have access to and to copy all such records. Any record required to be maintained by this section shall be maintained for a period of two years after the transaction, which is the subject of such record, has taken place.

PENALTIES

SEC. 12. (a) Any person who violates the provisions of section 9, 10, 11, or 17, shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than six months, or a fine of not more than $3,000, or both such imprisonment and fine; but if such violation is committed after one conviction of such person under this section has become final such person shall be subject to imprisonment for not more than one year, or a fine of not more than $5,000, or both such imprisonment and fine; but if such violation is committed after two or more convictions of such person under this section have become final such person shall be subject to imprisonment for not more than

two years, or a fine of not more than $10,000, or both such imprisonment and fine. When construing or enforcing the provisions of said sections the act, omission, or failure of any person acting for or employed by any individual, partnership, corporation, or association within the scope of his employment or office shall in every case be deemed the act, omission, or failure of such individual, partnership, corporation, or association, as well as of such person.

(b) No carrier shall be subject to the penalties of this Act, other than the penalties for violation of section 11, by reason of his receipt, carriage, holding, or delivery, in the usual course of business, as a carrier, of slaughtered poultry or poultry products, owned by another person unless the carrier has knowledge, or is in possession of facts which

—71 Stat. 447—

would cause a reasonable person to believe that such slaughtered poultry or poultry products were not inspected or marked in accordance with the provisions of this Act or were not otherwise eligible for transportation under this Act.

REPORTING OF VIOLATIONS

SEC. 13. Before any violation of this Act is reported by the Secretary to any United States attorney for institution of a criminal proceeding, the person against whom such proceeding is contemplated shall be given reasonable notice of the alleged violation and opportunity to present his views orally or in writing with regard to such contemplated proceeding. Nothing in this Act shall be construed as requiring the Secretary to report for criminal prosecution violations of this Act whenever he believes that the public interest will be adequately served and compliance with the Act obtained by a suitable written notice or warning.

REGULATIONS

SEC. 14. The Secretary shall promulgate such rules and regulations as are necessary to carry out the provisions of this Act.

EXEMPTIONS

SEC. 15. (a) The Secretary shall, by regulation and under such conditions as to sanitary standards, practices, and procedures as he may prescribe, exempt from specific provisions of this Act—

(1) poultry producers with respect to poultry of their own raising on their own farms which they sell directly to household consumers or restaurants, hotels, and boarding houses for use in their own dining rooms or in the preparation of meals for sales direct to consumers only: *Provided,* That such poultry producers do not engage in buying or selling poultry products other than those produced from poultry raised on their own farms;

(2) retail dealers with respect to poultry products sold directly to consumers in individual retail stores, if the only processing operation performed by such retail dealers is the cutting up of poultry products on the premises where such sales to consumers are made;

(3) for such period of time as the Secretary determines that it would be impracticable to provide inspection and exemption will aid in the effective administration of this Act, any person engaged in the processing of poultry or poultry products for commerce and the poultry or poultry products processed by such person: *Provided, however,* That no such exemption shall continue in effect on and after July 1, 1960; and

(4) persons slaughtering, processing, or otherwise handling poultry or poultry products which have been or are to be processed as required by recognized religious dietary laws, to the extent that the Secretary determines necessary to avoid conflict with such requirements while still effectuating the purposes of this Act.

(b) The Secretary may by order suspend or terminate any exemption under this section with respect to any person whenever he finds that such action will aid in effectuating the purposes of this Act.

—71 Stat. 448—

VIOLATIONS BY EXEMPTED PERSONS

SEC. 16. Any person who sells, delivers, transports or offers for sale or transportation in commerce or in a designated major consuming area any poultry or poultry products which are exempt under section 15, and which are unwholesome or adulterated and are intended for human consumption, shall be guilty of a misdemeanor and shall on conviction thereof be subject to the penalties set forth in section 12.

IMPORTS

SEC. 17. (a) No slaughtered poultry, or parts or products thereof, of any kind shall be imported into the United States unless they are healthful, wholesome, fit for human food, not adulterated, and contain no dye, chemical, preservative, or ingredient which renders them unhealthful, unwholesome, adulterated, or unfit for human food and, unless they also comply with the rules and regulations made by the Secretary of Agriculture to assure that imported poultry or poultry products comply with the standards provided for in this Act. All imported, slaughtered poultry,

or parts or products thereof, shall after entry into the United States in compliance with such rules and regulations be deemed and treated as domestic slaughtered poultry, or parts or products thereof, within the meaning and subject to the provisions of this Act and the Federal Food, Drug, and Cosmetic Act [52 Stat. 1040], and Acts amendatory of [21 U. S. C. 301], supplemental to, or in substitution for such Acts.

(b) The Secretary of Agriculture is authorized to make rules and regulations to carry out the purposes of this section and in such rules and regulations the Secretary of Agriculture may prescribe the terms and conditions for the destruction of all slaughtered poultry, or parts or products thereof, offered for entry and refused admission into the United States unless such slaughtered poultry, or parts or products thereof, be exported by the consignee within the time fixed therefor in such rules and regulations.

(c) All charges for storage, cartage, and labor with respect to any product which is refused admission pursuant to this section shall be paid by the owner or consignee, and in default of such payment shall constitute a lien against any other products imported thereafter by or for such owner or consignee.

GENERAL PROVISIONS

SEC. 18. (a) For the purpose of preventing and eliminating burdens on commerce in poultry and poultry products, the jurisdiction of the Secretary within the scope of this Act shall be exclusive and poultry and poultry products shall be exempt from the provisions of the Federal Food, Drug, and Cosmetic Act, as amended [21 U. S. C. 301], to the extent of the application or the extension thereto of the provisions of this Act.

(b) In carrying out the provisions of this Act, the Secretary may cooperate with other branches of Government and with State agencies and may conduct such examinations, investigations, and inspections as he determines practicable through any officer or employee of a State commissioned by the Secretary for such purpose.

COST OF INSPECTION

SEC. 19. The cost of inspection rendered under the requirements of this Act, shall be borne by the United States, except that the cost of overtime and holiday work performed in establishments subject to the provisions of this Act at such rates as the Secretary may determine shall be borne by such establishments. Sums received by the Secretary in

—71 Stat. 449—

reimbursement for sums paid out by him for such premium pay work shall be available without fiscal year limitation to carry out the purposes of this section.

APPROPRIATIONS

SEC. 20. There is hereby authorized to be appropriated such sums as are necessary to carry out the provisions of this Act.

SEPARABILITY OF PROVISIONS

SEC. 21. If any provision of this Act or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the Act and of the application of such provision to other persons and circumstances shall not be affected thereby.

EFFECTIVE DATE

SEC. 22. This Act shall take effect upon enactment, except that no person shall be subject to the provisions of

this Act prior to January 1, 1959, unless such person after January 1, 1958, applies for and receives inspection for poultry or poultry products in accordance with the provisions of this Act and pursuant to regulations promulgated by the Secretary hereunder, in any establishment processing poultry or poultry products in commerce or in a designated major consuming area. Any person who voluntarily applies for and receives such inspection after January 1, 1958, shall be subject, on and after the date he commences to receive such inspection, to all of the provisions and penalties provided for in this Act with respect to all poultry or poultry products handled in the establishment for which such said application for inspection is made.

Approved August 28, 1957.

STATE OF NEW YORK

DEPARTMENT OF AGRICULTURE AND MARKETS

New York State Regulations

WEIGHTS AND MEASURES MANUAL—Circular 834

221.9. METHOD OF SALE OF SPECIFIC COMMODITIES

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(c) *Meat, poultry and fish.* Except for immediate consumption on the premises where sold or as one of several elements comprising a ready-to-eat meal sold as a unit for consumption elsewhere than on the premises where sold, all meat, meat food products, poultry (whole or parts) and all seafood except shellfish, offered or exposed for sale or sold, as food shall be offered or exposed for sale and sold by net weight. The meaning of the words meat and meat food products as used in this section is that defined in Section 96-g of the Agriculture and Markets Law.

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221.40. MEAT, POULTRY AND FISH. Meat, poultry and fish shall be sold or offered for sale as food at retail by net weight only.

UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURAL MARKETING SERVICE

POULTRY DIVISION

REGULATIONS GOVERNING THE INSPECTION OF POULTRY AND POULTRY PRODUCTS

DEFINITIONS

§ 81.1 *Definitions.* For the purposes of the regulations in this part, unless the context otherwise requires, the following terms shall have the following meanings:

Acceptable. "Acceptable" means suitable for the purpose intended and acceptable to the Administrator.

Act. "Act" means the Poultry Products Inspection Act (71 Stat. 441.).

Administrator. "Administrator" means the Administrator of the Agricultural Marketing Service of the Department or any other officer or employee of the Department to whom there has heretofore been delegated, or to whom there may hereafter be delegated the authority to act in his stead.

Adulterated. "Adulterated" shall apply to poultry and poultry products under one or more of the following circumstances:

(1) If they bear or contain any poisonous or deleterious substance which may render them injurious to health, but, in case the substance is not an added substance, such poultry and poultry products shall not be considered adulterated under this clause if the quantity of such substance in such poultry and poultry products does not ordinarily render then injurious to health.

(2) If they bear or contain any added poisonous or added deleterious substance, unless such substance is permitted in their production or unavoidable under good manufacturing practices as may be determined by the regulations in this part or other provisions of Federal law limiting or tolerating the quantity of such added substance on or in such poultry and poultry products: *Provided*, That any quantity of such added substance exceeding the limits so fixed shall also be deemed to constitute adulteration.

(3) If any substance has been substituted, wholly or in part, therefor.

(4) If damage or inferiority has been concealed in any manner.

(5) If any valuable constituent has been in whole or in part omitted or abstracted therefrom.

(6) If any substance has been added thereto or mixed or packed therewith so as to increase its bulk or weight, or reduce its quality or strength, or make it appear better or of greater value than it is.

Applicant. "Applicant" means any person who requests any inspection service.

Commerce. "Commerce" means commerce between any State, Territory, or possession or the District of Columbia, and any place outside thereof; or between points within the same State, or the District of Columbia, but through any place outside thereof; or within the District of Columbia, or between a designated major consuming area and any point outside thereof; or within a designated major consuming area.

Consumer package. "Consumer package" means any container in which a poultry product is enclosed for the purpose of display and sale to household consumers.

Container or package. "Container or package" includes any box, can, tin, cloth, plastic, or any other receptacle, wrapper, or cover.

Department. "Department" means the United States Department of Agriculture.

Dressed poultry. "Dressed poultry" means poultry which has been slaughtered for human food with head, feet, and viscera intact and from which the blood and feathers have been removed.

Dressed poultry identification mark. "Dressed poultry identification mark" means the symbol formulated pursuant to the regulations in this part stating that the dressed poultry is eligible for further processing in official establishments under USDA inspection.

Food product containing poultry product. "Food product containing poultry product" means any article of food for human consumption which is prepared in part from ready-to-cook poultry, but which has been exempted by the Administrator from the category of a poultry food product.

Free from protruding pinfeathers. "Free from protruding pinfeathers" means that the carcass is free from protruding pinfeathers which are visible to an inspector during an examination of the carcass at normal operating speeds. However, a carcass may be considered as being free from protruding pinfeathers if it has a generally clean appearance (especially on the breast), and if not more than an occasional protruding pinfeather is in evidence during a more careful examination of the carcass.

Giblets. "Giblets" means the liver from which the bile sac has been removed, the heart from which the pericardial sac has been removed, and the gizzard from which the

lining and contents have been removed: *Provided,* That each such organ has been properly trimmed and washed.

Immediate container. The term "immediate container" includes any consumer package; or any other container in which poultry carcasses or poultry products, not consumer packaged, are packed.

Inspected for wholesomeness. "Inspected for wholesomeness" means, with respect to any poultry product, that it has undergone an inspection and was found at the time of such inspection to be wholesome and not adulterated.

Inspection. "Inspection" means any ante mortem examination of poultry or any post-mortem inspection of dressed poultry at the time of evisceration or any inspection by an inspector to determine in accordance with the regulations in this part (1) the wholesomeness of any poultry product at any stage of the preparation or packaging thereof in the official establishment where inspected for wholesomeness, or (2) the wholesomeness of any previously inspected poultry product if such poultry product has not lost its identity as an inspected product.

Inspection service. "Inspection service" means the official service within the Department having the responsibility for carrying out the provisions of the Poultry Products Inspection Act. Inspection service also means the activities performed, including official reporting, by such official service.

Inspector. "Inspector" means (1) an employee or official of the United States Government, authorized by the Administrator to inspect poultry and poultry products, pursuant to the regulations in this part, or (2) an employee or official of any State government, authorized by the Administrator to inspect poultry and poultry products,

pursuant to the regulations in this part, under an agreement entered into between the Agricultural Marketing Service and the appropriate State agency.

Label. "Label" means any written, printed, or graphic material upon the shipping container, if any, or upon the immediate container, including but not limited to an individual consumer package of the poultry product, or accompanying such product.

Official establishment. "Official establishment" means any establishment as determined by the Administrator at which inspection of the slaughter of poultry, or the processing of poultry products, is maintained pursuant to the regulations in this part.

Official identification. "Official identification" means the official inspection mark or the dressed poultry identification mark.

Official inspection mark. "Official inspection mark" means the symbol, formulated pursuant to the regulations in this part, stating that the poultry product was inspected.

Person. "Person" means any individual, partnership, corporation, association, or any other business unit.

Potable water. "Potable water" means water that has been approved by the State health authority or agency or laboratory acceptable to the Administrator as safe for drinking, and suitable for food processing.

Poultry. "Poultry" means any live or slaughtered domesticated bird (chickens, turkeys, ducks, geese or guineas).

Poultry food product. "Poultry food product" means any human food product consisting of any edible part or parts of poultry in combination with other ingredients

unless such human food product is exempted by the Administrator.

Poultry product. "Poultry product" means any ready-to-cook poultry or any poultry food product.

Product. "Product" means dressed poultry or poultry product or both.

Ready-to-cook poultry. "Ready-to-cook poultry" means any dressed poultry from which the protruding pinfeathers, vestigial feathers (hair or down as the case may be), head, shanks, crop, oil gland, trachea, esophagus, entrails, reproductive organs and lungs have been removed, and with or without the giblets, is ready to cook without need of further processing. Ready-to-cook poultry also means any cut-up or disjointed portion of poultry or any edible part thereof, as described in this paragraph.

Regulations. "Regulations" means the provisions of this entire part.

Secretary. "Secretary" means the Secretary of the Department, or any other officer or employee of the Department to whom there has heretofore been delegated or to whom there may hereafter be delegated, the authority to act in his stead.

Shipping container. "Shipping container" means any container used or intended for use in packaging the product packed in an immediate container.

Slaughter. "Slaughter" means the act of killing poultry for human food in accordance with good commercial practices in a manner which will result in thorough bleeding of the carcasses.

Unwholesome. "Unwholesome" means:

(1) Unsound, injurious to health, or otherwise rendered unfit for human food.

(2) Consisting in whole or in part of any filthy, putrid, or decomposed substance.

(3) Processed, prepared, packed, or held under unsanitary conditions whereby a poultry carcass or parts thereof or any poultry product may have become contaminated with filth or whereby a poultry product may have been rendered injurious to health.

(4) Produced in whole or in part from poultry which has died otherwise than by slaughter.

(5) Packaged in a container composed of any poisonous or deleterious substance which may render the contents injurious to health.

Wholesome. "Wholesome" means sound, healthful, clean, and otherwise fit for human food.

* * * * *

§ 81.7 *Poultry and poultry products entering or prepared in official establishments.*

All poultry and poultry products processed in an official establishment shall be inspected, handled, prepared, marked and labeled as required by the regulations in this part, and all dressed poultry and poultry products entering an official establishment shall have been inspected and shall be marked as required by the regulations in this part.

* * * * *

LABELING

§ 81.125 *Containers of poultry required to be labeled.* Except as provided in § 81.154 and as may be authorized by the Administrator with respect to shipment of products between official establishments, each shipping container and each immediate container of any product shall at the time it leaves the official establishment bear approved labels con-

taining information in accordance with the provisions set forth in §§ 81.126 to 81.146, inclusive, and the act.

* * * * *

§ 81.127 *Labels to be approved by the Administrator.* No label, except printer's proofs bearing official identification shall be printed until the printer's proof or a photostatic copy has been found by the Administrator to be acceptable; and no label or imprint bearing official identification shall be used until finished copies or samples thereof have been approved by the Administrator, except that approval may be given to printer's final proofs or photostatic copies of labels or samples of stenciled and rubber stamped imprints for shipping containers or containers for institutional packs, and no such labels or imprints shall be used until such proofs or copies have been approved by the Administrator.

* * * * *

§ 81.130 *Wording on labels.* (a) Each label approved for use on an immediate container for poultry products shall bear in distinctly legible form the following information:

(1) The common or usual name of the poultry product.

(2) A statement of ingredients if fabricated from two or more ingredients, including a declaration as to artificial flavors, colors, or preservatives, if any. Such ingredients shall be listed by their common or usual names in the order of their descending proportions. For the purpose of this paragraph, the term "chicken meat," unless modified by an appropriate adjective, is construed to mean deboned white and dark meat; whereas, the term "chicken" may include other edible parts such as skin and fat not in excess of their natural proportions, in addition to the chicken meat. If the term "chicken meat" is listed and the product also contains

skin, giblets, or fat, it is necessary to list each such ingredient. This terminology shall apply to poultry products prepared from other kinds of poultry where applicable.

(3) The net weight or other appropriate measure of the contents, except that the Administrator may approve the use of labels for certain types of immediate containers which do not bear the net weight: *Provided,* That the retailer or distributor supplying the retailer agrees in writing to the Administrator to mark the true net weight on the label prior to display and sale thereof: *And provided further,* That the shipping container bears a statement "Net weight to be marked on consumer packages prior to display and sale": *And provided further,* That the total net weight of the contents of the shipping container shall be marked on such container. The net weight marked on immediate containers of poultry products shall be the net weight of the poultry and shall not include the weights of the wet or dry packaging materials and giblet wrapping materials.

(4) The name and address of the packer or distributor and when the name of the distributor is shown, it shall be qualified by such term as "packed for," "distributed by," or "distributors."

(5) The official inspection mark.

(6) The plant number of the official establishment in which the product was inspected, either within the official inspection mark or clearly visible and in close proximity elsewhere on the exterior of the container, or in the case of canned product, the plant number may be embossed on the lid of each can. In the case of nontransparent consumer packages such as cartons, the plant number may be legibly printed thereon or it may be shown on an insert label placed on top of the product within the package. In the case of transparent wrappers, the plant number may be shown on

an insert label and so placed under the transparent covering that it will be clearly visible and legible.

(b) Each label approved for use on a shipping container shall bear in distinctly legible form the following information:

(1) The official inspection mark.

(2) The plant number of the official establishment in which the product was inspected, either within the official inspection mark, or elsewhere on the container clearly visible and in close proximity to the official inspection mark.

(c) Any label which bears the official inspection mark or any written, printed or graphic matter upon or accompanying any poultry product inspected or required to be inspected pursuant to the provisions of the regulations shall not bear any statement that is false or misleading. If the Administrator has reason to believe that any label in use or prepared for use is false or misleading in any particular, he may direct that the use of the label be withheld unless it is modified in such manner as the Administrator may prescribe so that it will not be false or misleading. If the person using or proposing to use the label does not accept the determination of the Administrator, he may request a hearing, but the use of the label shall, if the Administrator so directs, be withheld pending hearing and final determination by the Administrator. Any person so denied the approval of any label shall be notified promptly of the reasons for the denial. A written application for a hearing with respect to the denial may be filed by said person with the Administrator within 10 days after notice of the denial. Such petition shall state specifically the errors alleged to have been made by the Administrator in denying approval of the label. After consideration of the facts adduced at the hearing, any determination with respect to the matter by the Administrator

shall be conclusive unless, within 30 days after the receipt of notice of such final determination, the person adversely affected thereby appeals to the United States Court of Appeals for the Circuit in which he has his principal place of business, or to the United States Court of Appeals for the District of Columbia Circuit. The provisions of section 204 of the Packers and Stockyards Act of 1921, as amended, shall be applicable to appeals taken under this section.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 848

SWIFT & COMPANY, INC. and ARMOUR AND COMPANY,

Petitioners,

v.

DON J. WICKHAM, Commissioner of Agriculture & Markets of the State of New York,

Respondent.

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented	1
Statutes Involved	2
Statement of the Case	2
POINT I—The Poultry Products Inspection Act does not preempt the field so as to prevent New York's regulation of labels, weights and measures of such items inspected under that Act	5
POINT II—There is no direct conflict between federal and New York law. Moreover, as the courts below have held, since petitioners have failed to exhaust the administrative procedures available to them under the federal Poultry Products Inspection Act any claim by them with respect to an alleged conflict, on the record presented here, is fatally premature	6
Conclusion	9

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Respondent.

BRIEF IN OPPOSITION

Opinions Below

The opinion of the District Court is reported in 230 F. Supp. 398 (S.D.N.Y.). The opinion of the Circuit Court of Appeal is reported in 364 F. 2d 241 (2d Cir.).

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Whether the Poultry Products Inspection Act pre-empted the field so as to preclude New York's weight

labeling enactments with respect to poultry inspected under that Act?

2. Whether on the record presented here the Poultry Products Inspection Act directly conflicts with the interpretation of New York's Agriculture & Markets Law § 193.3?

Statutes Involved

The Poultry Products Inspection Act; Sections 81.1, 81.3, 81.7, 81.125, 81.127, 81.130 of 7 C.F.R.: Section 193 of the Agriculture and Markets Law of the State of New York; and Regulations 221.40 and 221.9C of the State of New York.

Statement of the Case

Petitioners pack and ship frozen stuffed turkeys to the State of New York from their processing plants in Minnesota and Wisconsin. Upon entry into New York State they are sold to retailers who in turn offer them for sale to the general public.

Section 193.3 of the New York Agriculture and Markets Law provides that

> "All food and food products offered for sale at retail and not in containers shall be sold or offered for sale by *net weight*, standard measure or numerical count under such regulations as may be prescribed by the commissioner." (emphasis supplied)

The respondent commissioner's interpretation of "net weight" requires that frozen stuffed turkeys, offered for sale in New York to bear labels showing separately (a) the weight of the turkey without the stuffing and (b) the total "net weight" of the bird and the stuffing.

The federal Poultry Products Inspection Act requires, *inter alia*

> "[A] statement of ingredients if fabricated from two or more ingredients including a declaration as to artificial flavor, colors, or preservatives, if any, [any] the *net weight or other appropriate measure of the contents.*" 21 U.S.C. 457(a) (emphasis supplied)

The regulations of the Secretary of Agriculture provide that such labels must receive prior approval before they may be used. 7 C.F.R. 81.126, 81.127. Accordingly, the petitioners submitted to the federal agency the sample labels listing the two weights—the weight of the unstuffed bird and the total net weight of the bird and stuffing. These labels were disapproved by the head of the federal Poultry Products Section. Among the several reasons set forth by the subordinate officer in a letter for disapproving these labels was that the federal Poultry Act is interpreted as requiring a single label showing the net weight of the entire poultry product, the turkey plus stuffing. This initial holding by that subordinate, prevented petitioners from complying with New York's requirements and is the sole basis for their action seeking to declare New York's weight statute unconstitutional.

Although the fact that the federal Poultry Act permits a full administrative hearing to question the disapproval of a label, 21 U.S.C. 457(b), petitioners chose not to take advantage of this procedure. Instead, they relied only upon the aforementioned letter of disapproval and commenced this action in the United States District Court for the Southern District of New York.

Following a three-day trial before a statutory three-judge court, petitioners' complaint was dismissed. The court unanimously rejected petitioners' claim under the commerce clause and held that their Fourteenth Amend-

ment contentions were wholly without substance. After analyzing the federal statute in detail the court found no congressional purpose to preempt the field of labelling and that the state regulation did not create an irreconcilable conflict with the federal enactments. Moreover, the court said that where an administrative procedure is available, a party may not simply rely upon a letter from a subordinate federal official to avoid compliance with a state regulation.

Finally, the three-judge court expressed concern that there were serious doubts that a claim of preemption coupled with insubstantial federal constitutional questions necessitated a three-judge court. In order to avoid the possibility of an invalid order the Court directed that the judgment dismissing the complaint be entered in the name of the three-judge court and in the name of the single district judge.

Petitioners thereafter appealed directly to this Court but the appeal was dismissed on the ground that this case did not require a statutory three-judge court. In reaching the conclusion this Court specifically held that petitioners' claims under the commerce clause and the Fourteenth Amendment were insubstantial. *Swift & Co.* v. *Wickham*, 382 U. S. 111.

Thereafter petitioners, who had preserved their appeal to the Court of Appeals for the Second Circuit, prosecuted the appeal. That court unanimously held there was no basis for petitioners' preemption claim and found no irreconcilable conflict between the federal and state weight regulations on the record before it. In passing, the Court of Appeals chastised petitioners for failing to discharge their burden of establishing conflict since they had failed to pursue their administrative procedures under the federal Poultry Act. *Swift & Co.* v. *Wickham*, 364 F. 2d 241 (2nd Cir.).

POINT I

The Poultry Products Inspection Act does not preempt the field so as to prevent New York's regulation of labels, weights and measures of such items inspected under that Act.

Petitioners' initial ground presented for seeking the granting of certiorari is misleading. They contend that this Court has never determined a case involving regulation by the states of the *same* labels initially approved of by a federal agency where such prior approval is provided for by the Congress. This claim is patently erroneous. See *McDermott* v. *Wisconsin*, 228 U. S. 115. In any event, New York clearly does not seek to regulate the same label as approved by the Secretary of Agriculture. Rather, New York, under its police powers, for the protection of its consumers, simply requires more comprehensive label disclosures. Certainly, this proposition is neither so novel nor startling to invoke the certiorari jurisdiction of this Court.

In *Florida Avocado Growers v. Paul*, 373 U. S. 132, this Court held that the Secretary of Agriculture's authority to promulate regulations governing the marketing of avocados in interstate commerce did not prevent California from imposing more stringent standards for the sale of avocados at retail in that state where such local regulation was for the protection of its consumers. *Id.* at 144-145. There this Court pertinently observed that "congressional regulation of one end of the stream of commerce does not, *ipso facto*, oust all state regulation at the other end." *Id.* at 145.

Similarly, in *Cloverleaf Butter Co.* v. *Patterson*, 315 U. S. 148, this Court noted that it is "permissible under all the authorities" for a state to impose upon imported foodstuffs "a higher standard demanded . . . for its consumers." *Id.* at 162.

McDermott v. *Wisconsin*, 228 U. S. 115, cited by petitioners is not to the contrary. In *McDermott* the state enactment permitted sale of the articles there involved only when labeled according to the state law. Wisconsin's regulations, unlike those here, would have required the removal of the federally approved label. More relevant here is this Court's subsequent decision in *Corn Products Refining Co.* v. *Eddy*, 249 U. S. 427, which distinguished the *McDermott* decision, *supra*, and held that the state has the right to require information on the label supplemental to that furnished under the federal act. See also *Savage* v. *Jones*, 225 U. S. 501; *Armour & Co.* v. *North Dakota*, 240 U. S. 510.

The courts below have properly held, after a careful review of the legislative history of the federal Poultry Act and from the nature of the subject matter to be regulated, that there was no intention on the part of the Congress to construct a uniform national standard requiring the preemption of the instant state regulation concerning the disclosure on labels of the net weight of poultry products. The petitioners accordingly have neither overcome the holding below nor presented a valid basis for invoking this Court's certiorari jurisdiction.

POINT II

There is no direct conflict between federal and New York law. Moreover, as the courts below have held, since petitioners have failed to exhaust the administrative procedures available to them under the federal Poultry Products Inspection Act any claim by them with respect to an alleged conflict, on the record presented here, is fatally premature.

The federal Poultry Products Inspection Act simply requires that an inspected bird be labeled with its "net weight or other appropriate measure of the contents . . ." 21 U.S.C. 457(a) while the regulations contain no prohibi-

tion against a dual weight label (7 C.F.R. 81.125-81.156). Accordingly, the District Court below properly observed that there is no showing on the record here that the United States would prohibit the petitioners "from affixing an *additional* label that will meet New York's requirements." *Swift & Co.* v. *Wickham*, 230 F. Supp. 398, 408 (S.D.N.Y.) (emphasis supplied). The only basis for petitioners' claim of conflict is a communication by a subordinate federal official which rejected the particular labels submitted by petitioners on their application for label approval. This initial rejection by the subordinate official obviously cannot be construed, in any sense, as a broad ruling "that any supplementary labelling of weight in addition to that satisfying the [Agriculture] Department would be unlawful." *Id.* at 408. It should be categorically stated that the District Court and the Court of Appeals found that the various reasons advanced by the federal subordinate officer for denial of petitioners' label applications lacked any factual basis.

The courts below thus properly held that the federal law and regulation do not conflict with the state enactments.

Petitioners' claim of conflict, as just noted, rests entirely upon a letter composed by a lower echelon official of the United States Department of Agrictulture. Yet the petitioners deliberately avoided their statutory right to a full administrative hearing provided for in the federal Poultry Act. 21 U.S.C. 457(b). At such a hearing all of the interested parties (including the State of New York) could have presented their contentions to the Agriculture Department with a resultant final authoritative interpretation of the federal enactments by such federal agency. Indeed, petitioners' good faith is in issue here since they simply "accepted", without more, the inferior officer's determination. To ask the federal courts to enjoin New York from enforcing its laws without such final federal administrative determination flies in the face of this Court's holdings in several cases

that it would refuse to permit premature judicial determination where there is an available administrative procedure present, in the first instance, to adjudicate conflicting claims of state and federal agencies. *Federal Power Commission* v. *Arkansas Power & Light Co.*, 330 U. S. 802, *reversing per curiam*, 156 F. 2d 821 (D. C. Cir.).

The petitioners' contention here that as a result of the decision below, the Secretary of Agriculture must now alter his practice of prior approval for labelling of poultry, is without merit. The Court of Appeals did not, in any manner, as petitioners suggest, hold or otherwise imply that the Secretary "must defer" to individual state labelling regulations. The Court simply held on the record before it that there was no showing of an irreconcilable conflict here. And, as noted above, the Court additionally held that where an otherwise valid state law is involved, the applicant, in the face of a preliminary label disapproval by a subordinate administrative official, should exhaust his available administrative remedy provided for in the instant federal act (21 U.S.C. 457[b]) before commencing an action in the District Court alleging an "irreconcilable" conflict between the federal and state enactments. This hardly requires the conclusion suggested here by petitioners.

Finally, petitioners allege that in accordance with the decision below, they have held a series of meetings with the officials of the federal agency involved here while New York has failed to do so. It should be noted, however, that the respondent by letter dated December 19, 1966 communicated with the United States Department of Agriculture (in the absence of the receipt of any communication from that Bureau), in order to arrange a conference to resolve any outstanding policy considerations. Irrespective of whether the fact that the federal and state agencies have not yet met is a ground for invoking this Court's certiorari jurisdiction, we gravely question whether petitioners' efforts comply

with the Court of Appeals' misgivings concerning petitioners' failure to request a full administrative hearing pursuant to 21 U.S.C. 457(b). The proper procedure to be followed by petitioners is simply for them to refile the label application conforming to New York State's requirements and in the event of disapproval, all the interested parties including New York should participate in a full administrative review and a satisfactory solution achieved.

This Court should accordingly refrain from exercising its certiorari jurisdiction here.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should not be granted.

Dated: New York, New York, January 10, 1967.

Respectfully submitted,

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REPLY BRIEF

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IN THE

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SWIFT & COMPANY, INC. and ARMOUR AND COMPANY,
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—v.—

DON J. WICKHAM, Commissioner of Agriculture & Markets of the State of New York,
Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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POINT I

This case presents a question which has never previously been determined by this Court.

In its Brief in Opposition to the Petition for Certiorari herein, Respondent labels as "patently erroneous" Petitioner's claim that this Court has never determined the question of pre-emption where the federal statute involved provides for prior approval of labels. In support of this contention, Respondent relies upon *McDermott* v. *Wisconsin*, 228 U. S. 115. Further along in its argument Respondent also cites *Corn Products Refining Company* v. *Eddy*, 249 U. S. 427, and *Savage* v. *Jones*, 225 U. S. 501. All of these cases arose under the Food and Drugs Act of 1906, 34 Stat. 768. That statute contained very limited regulation of labels. Indeed, this Court has not been called upon to

rule on any questions of pre-emption with respect to labelling under the Federal Food, Drug and Cosmetic Act, 21 U. S. C. 301 *et seq.*, 52 Stat. 1049, which contains very extensive label regulation. However, even under the latter Act, with its comprehensive labelling provisions, a shipper is free to send his product into the channels of commerce bearing any label of his choice. He may be subjecting himself to the remedies of seizure, prosecution or injunction if his label is in violation of the law, but these sanctions come into play only after the product has been introduced into interstate commerce.

On the other hand, under the Poultry Products Inspection Act, 21 U. S. C. 451 *et seq.*, 71 Stat. 441, which is involved in this litigation, no product may leave an establishment under the jurisdiction of the Secretary of Agriculture unless its label has been approved in advance.

The distinction is one of substance, not merely of form. Whereas Congress has required the Food and Drug Administration to challenge labels *in use* which do not comply with the standards of the Food, Drug and Cosmetic Act, it has chosen to charge the Secretary of Agriculture with the responsibility of supervising the text of poultry labels *before they may be placed upon an inspected product in the first instance.* In so doing, Congress has reflected its intention that the Secretary of Agriculture shall have complete control of poultry labelling, which is inconsistent with any concurrent control on the part of the states.

POINT II

The issue of irreconcilable conflict between federal and state law is important in the administration of the Poultry Products Inspection Act and should be determined by this Court.

Each year a tremendous number of labels are submitted to the Department of Agriculture for approval for use under the Poultry Products Inspection Act or the Meat Inspection Act, 21 U. S. C. 71 *et seq.*, 34 Stat. 1206. The necessity to conduct administrative hearings and perhaps to engage in litigation in a United States Court of Appeals with respect to label determinations which are in accordance with long standing policy and with which applicants have no basic disagreement, as was the case herein, would reduce the administration of these two important consumer protection statutes to chaos. The affected industries and the Department of Agriculture itself have a right and an overriding need to have a definitive determination of this question in order that they might provide for the efficient conduct of their respective functions. Reference is made in Respondent's Brief in Opposition to a letter by Respondent to the United States Department of Agriculture, under date of December 19, 1966, seeking to arrange a conference to resolve outstanding policy considerations. Counsel is advised that the Department of Agriculture responded to that letter on January 6, 1967, indicating a willingness to meet in the near future. It is significant, however, that in neither communication was there any indication that either agency has any concrete proposal for discussion, nor that either agency is prepared to retreat in any respect from the position which it has steadfastly maintained up to the present time.

CONCLUSION

For the foregoing reasons, as well as those outlined in the Petition itself, this Petition for a writ of certiorari should be granted.

Dated: New York, New York, January 16, 1967.

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